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NEW JERSEY EQUITY REPORTS

VOLUME VI

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NEW JERSEY EQUITY REPORTS,

VOLUME VI.

HALSTED, VOLUME II.

REPORTS OF THE

COURT OF CHANCERY

FOR THE YEAR 1884

NEW JERSEY EQUITABLE REPORTS

VOLUME VI

PUBLISHED, VOLUME II

REPORTS OF CASES
[DETERMINED IN THE
COURT OF CHANCERY,
AND IN THE
PREROGATIVE COURT,
AND, ON APPEAL, IN THE
COURT OF ERRORS AND APPEALS,
OF THE
STATE OF NEW JERSEY.

GEORGE B. HALSTED, Reporter.

VOLUME II.

SECOND EDITION.

WITH REFERENCES SHOWING WHERE THE CASES HAVE BEEN CITED, AFFIRMED, OVERRULED, QUESTIONED, LIMITED, ETC., DOWN TO PART I, VOL. XXXIX, N. J. LAW REPORTS (X VROOM), AND PART I, VOL. XXVIII, N. J. EQ. REPORTS (I STEW.), INCLUSIVE.

By John Linn, Esq., of the Hudson Co. Bar.

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
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 THIS Volume continues the decisions in Chancery by the Chancellor appointed under the New Constitution, adopted August 15th, 1844.

OLIVER SPENCER HALSTED,

CHANCELLOR.

Appointed February 5th, 1845.

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ADJUDGED IN

THE COURT OF CHANCERY,

OF THE

STATE OF NEW JERSEY.

DECEMBER TERM, 1846.

OLIVER S. HALSTEAD, CHANCELLOR.

THE AMERICAN LIFE AND FIRE INSURANCE AND TRUST COMPANY v. PETER M. RYERSON.

1. When a mortgage is foreclosed for default of payment of an installment, the residue of the money not being due, the whole premises will not be directed to be sold unless a necessity for such a course exists; and when in such a case a decree has been entered for the sale of the whole premises, the court will, in its discretion, regulate the process of execution under the decree.

2. A borrowed money of B on an agreement, making it payable in installments, and gave his notes for the payment of the installments, and a decree in this court against A was assigned to B as collateral security for the payment of the notes. The decree assigned was general, that the mortgaged premises be sold to pay the whole sum mentioned in the decree, and that a *fi. fa.* issue for the sale of so much of the mortgaged premises as would be sufficient to pay the said sum. The mortgaged premises were manifestly divisible. An installment having become due, the sheriff was about to sell under the decree to raise the whole sum. He was restrained by order of the court. And subsequently, on a motion to vacate the order, it was held that the decree could be used only so far, and at such times as should be necessary to enforce the performance of the principal agreement, (the agreement on

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which the money was borrowed and the notes given,) and in the same way as if the court had been asked to direct process of execution on the decree in view of the principal agreement.

3. The motion to vacate the order was denied, and a sale was directed of so much of the mortgaged premises as would be sufficient to pay the installment which had become due.

On the 13th October, 1840, "The American Life and Fire Insurance and Trust Company" filed their bill against Peter M. Ryerson and wife, and others, to foreclose a mortgage, dated July 10th, 1835, given by Ryerson and his wife to the said company, to secure the payment of a bond of the same date, given by Ryerson to the company, conditioned for the payment of \$20,000, in five years from date, with interest, payable half yearly; with a provision that in case the interest should at any time be in arrear for ninety days, the whole principal should be forthwith paid. Two years' interest was due when the bill was filed. To this bill Ryerson filed an answer, on the 24th May 1841, setting up usury. On the 6th of July, 1842, the company made an assignment to Patrick McCauley, Geo. F. Talman and Anthony Barclay, in trust, &c.

The assignment authorizing two of the trustees to act, Barclay declined accepting the trust; McCauley and Talman accepted. On the 10th of October, 1844, McCauley and Talman and "The American Life and Fire Insurance and Trust Company" filed a bill called an original bill in the nature of a supplemental bill, stating the assignment, &c. To this bill Ryerson, on the 5th of March, 1845, filed an answer, setting up the usury again, and admitting the assignment to McCauley and Talman. No replication to this answer was put in. No future proceeding was had in the cause till September 18th, 1845. On this last-mentioned day a decree was entered for \$21,000 and costs by the written consent of Ryerson, stating that on a compromise had with the complainants he had agreed to withdraw his defence and consent to a decree for that amount, with interest from September 6th, 1845; this written consent being signed July 26th, 1845.

At this point of time, according to the petition of Ryerson, on which the motion is made, the following facts occurred. The petition, after stating that the lands covered by the said mortgage

amount, in extent, to 4500 acres, and that there are on the premises a forge, grist mill, saw mill, several farm houses and dwelling houses for workingmen; and that he had commenced building a furnace on the premises or on a part thereof; and that it was very important for him to finish the furnace and commence making iron; sets forth that the bonds of the said "The American Life and Fire Insurance and Trust Company" became very much depreciated, and that he found he could buy them at 20 per cent. of their par value. That he, therefore, made an arrangement with Talman, (one of the assignees of the company,) by which Talman agreed to take the bonds of the company for £5000 sterling and \$400 in cash, in payment of the said mortgage. That having made this arrangement, he, the petitioner, applied to the Greenwich Bank of New York for a loan of money. That the said Greenwich Bank then held a claim against the petitioner for over \$8000 which had been always disputed by the petitioner as being upon a usurious consideration, and which had never, on that account, been presented, and which the said bank considered of little value, and which they had before that time, and then also, offered to the petitioner to settle for \$1000. That when he applied to the said bank for a loan of money, as aforesaid, he stated to the bank his anxiety to get the furnace complete and in operation; and that, as soon as he could do so, he would be in the receipt of money, and would repay them the money they would advance him, together with their said above-mentioned claim. That he, the petitioner, would not have agreed to pay the said claim except for the consideration stated in his petition, and which he considered as a bonus for the loan and in fact a usurious consideration for the same. That thereupon the said bank and the petitioner came to an agreement to the effect following: that the bank would loan the petitioner \$12,000, and Christian E. Detmold should lend the petitioner \$1500; and that out of this money the petitioner, or the bank for him, should buy up the said bond and mortgage of the American Life and Fire Insurance and Trust Company as before agreed upon, and that \$4000 of the money should be expended on the furnace which the petitioner had begun to build as aforesaid, to complete the same. That the petitioner being in very needy

and embarrassed circumstances, and looking to the starting of his furnace to extricate himself, was obliged to submit to such terms as the said bank might impose. That the bank required—1st. That a decree should be entered in the said suit in chancery, in favor of McCauley and Talman, assignees of the American Life and Fire Insurance and Trust Company, on the 26th of July, 1845, for \$21,000, besides costs; that they should assign the said decree to Christian E. Detmold; and that Detmold should assign it to Benj. F. Wheelwright, the president of the said bank, in trust for the said bank. 2d. That the petitioner should give his nine notes, for \$1500 each, to said Detmold, payable in 6, 9, 12, 15, 18, 21, 24, 27 and 30 months from date, all to be dated Sept. 12th, 1845, with interest; and that the last eight notes should be endorsed by Detmold to the bank. 3d. That the petitioner should confess a judgment in the Supreme Court of New York for \$8487, with costs, the amount of the said disputed claim of the said bank against him; and that this amount should form a part of the \$21,000, for which the said decree should be entered. 4th. That the petitioner should procure an assignment to the bank of a judgment for \$3218.87, which A. P. Hopper had recovered against the petitioner in the Supreme Court of New Jersey, a part of which had been paid; Hopper to have all the moneys to be raised on said judgment, but the bank to have the control of the judgment. 5th. That the petitioner should assign to Wheelwright a lease he had made to Stephen Righter of the said forge, at an annual rent of \$500. 6th. That the petitioner shall assign to Wheelwright a right, which he had by the will of his father, to dig any quantity of ore from the Ringwood Great Furnace tract, for this furnace; which tract or right was not embraced in said mortgage. That all this was done as agreed upon; and that the bank agreed not to issue execution in case the said notes should be paid, as by reference to the agreement, a copy of which is appended to the petition, will appear. That the petitioner has since expended the said \$4000 on the furnace; and that he found that it was necessary to expend a still larger sum to complete it; and that beyond the said \$4000 he has expended the further sum of \$8000, making

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the sum of \$12,000 actually expended on the said furnace, dam and property. That he has been delayed in finishing the said furnace—first, by the difficulty he has had, in his embarrassed circumstances, to raise the money to finish it; and, secondly, by the sickness which has prevailed among his workmen, twenty of them employed there having become unable to work, fourteen of whom he sent to the hospital in New York; and, thirdly, by the sickness of the petitioner. That he expects to get the furnace in operation in less than a month from the date of his petition; and has prepared rising 50,000 bushels of charcoal, and about 800 tons of iron ore, to carry on the furnace, which forms no part of the \$12,000 expended on the freehold. The petitioner states that he believes that when the furnace shall go into operation, he can clear from the same, and the use of wood and ore, \$350 a week. That the bank knew he was straining every nerve to get the furnace into operation, and that he was expending a very large sum of money on the property covered by their mortgage. That only two of the said notes are due and payable to the bank, amounting to \$3000. The petitioner states that the real consideration for the bank to make the said loan, was the obtaining the said decree for \$21,000, and the securities before mentioned, which embraced the said unjust claim of \$8487, by reason whereof the bank obtained security for \$8487 beyond the amount loaned by it to the petitioner. That Wheelwright has caused the whole property to be advertised for sale under the said decree, on the 12th October, 1846, and has declared and threatened, and the petitioner says he has no doubt he intends to sell the whole, unless restrained, not only for the amount so loaned, but also for the said debt of \$8487. The petition prays that the sale may be stayed for some reasonable time after the furnace shall go into operation, and until the petitioner shall have time to file his bill to open the said decree, or obtain such relief as the court shall direct, and for such further and other relief, &c.

The agreement referred to in the petition bears date September 12th, 1845, and is an agreement between Peter M. Ryerson, of the first part, Christian E. Detmold, of the second part, and the Greenwich Bank, of the third part. It recites that a de-

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creed had been entered in the Court of Chancery of New Jersey, in certain causes lately pending in that court, on original bill and supplemental bill, between the American Life and Fire Insurance and Trust Company and McCaulay & Talman, assignees, complainants, and the said Ryerson and others, defendants, for the foreclosure of a certain mortgage given by Ryerson; by which decree the sum of \$21,000 had been established as the amount due, besides costs; which decree had been assigned to Detmold, and by him had been assigned, by one instrument, bearing even date with the agreement, to Benj. F. Wheelwright, in trust, &c. The agreement further recites that Ryerson was indebted to the bank in \$8487, with the costs, on a certain judgment recovered against him by the bank, in the Supreme Court of New York, on the said 12th of September, 1845, (the date of the agreement.) It then recites that, as part of the agreement and of the consideration thereof, Detmold had paid to Ryerson \$4000, and doth, by the said agreement, agree to pay to Ryerson the further sum of \$4000, as the same may be required for completing the furnace on the property described in the said mortgage, to be expended by and under the directions of Detmold. It then recites that Ryerson had made and delivered to Detmold his nine several promissory notes for \$1500 each, with interest, dated on the day of the date of the agreement, payable severally in 6, 9, 12, 15, 18, 21, 24, 27 and 30 months; the same being for part of the moneys due on the said decree. It then recites that the bank had loaned to Detmold, on the last eight of the said notes, \$12,000; that said eight notes have been endorsed by Detmold to the bank; that a certain judgment against Ryerson, in the Supreme Court of New Jersey, had been assigned to the bank by one Andrew Hopper, by an assignment dated September 1st, 1845, for the purposes mentioned in the said assignment. And then the parties to the said agreement agree as follows: That is to say, Ryerson agrees to pay Wheelwright, trustee, \$1500 of principal on said decree, with interest on the whole sum of \$21,000, decreed to be paid thereby, in six months from the date of the agreement; and \$1500 of principal, with all interest remaining due on the amount of said decree unpaid, at the expiration

American Life and Fire Insurance and Trust Co. v. Ryerson.

of every succeeding three months after the time fixed for the first payment ; and also, at the time of the last payment, \$987, with interest and costs, on the said judgment of the bank against Ryerson ; and in case such payments are made, the said Wheelwright, trustee, is not to proceed on the decree to a sale of the premises, and the bank is not to proceed on the said judgments, unless compelled by Hopper to proceed on his judgment so assigned to the bank ; and when the same is all paid off, the decree is to be assigned to Ryerson, the said first-mentioned judgment to be canceled, and the said last-mentioned judgment to be re-assigned to Hopper. And in case of default in making any of said payments, as above agreed, the parties are to be at liberty to proceed on the decree and judgments, without first having recourse to the personal property of Ryerson on the said last-mentioned judgment. The agreement then states that it is expressly understood that, out of the moneys received by the said Wheelwright, as aforesaid, the said nine notes are to be paid in their order, as they may respectively become due, and the balance to be appropriated towards the payment of the remaining \$7500 of the decree, and the sum of \$987 on the said judgment of the bank, with interest and costs ; and the bank further agree not to proceed in any manner on the said notes against Detmold, in case of default in the payment or any of them, till Wheelwright trustee, shall have completely exhausted his legal and equitable rights against the mortgaged premises, under the said decree ; and the bank further agree with Detmold not to part with any of the said notes. And, in consideration of the premises and of the assignment of said decree by Detmold to Wheelwright, in trust as aforesaid, and of \$1 paid by Detmold to the bank, the bank acknowledges that half of the said judgment in New York against Ryerson belongs to Detmold, and that he is to be paid the half of all sums collected or paid on it.

On this petition and copy of agreement annexed, an order was made, staying the sale till the further order of the court.

The motion now is, that the order staying the sale be vacated.

American Life and Fire Insurance and Trust Co. v. Ryerson.

R. Van Arsdale and P. D. Vroom, for the motion.

A. S. Pennington and B. Williamson, contra.

THE CHANCELLOR. It is manifest, from an examination of the agreement of the date of September 12th, 1845, between Ryerson, Detmold, and the Greenwich Bank, that the amount of the decree entered in the suit in this court, in favor of the American Life and Fire Insurance and Trust Company against Ryerson, was not the basis of the said agreement between Ryerson, Detmold, and the Greenwich Bank. The agreement states that a decree had been entered in favor of the said company for.....\$21,000

That the decree had been assigned to Detmold, and by him assigned to Wheelwright in trust, &c.; that the bank had, on the day of the date of the agreement, recovered a judgment in New York, against Ryerson, for 8,487

These two sums amount to..... \$29,487

And yet the whole sum which, by the agreement, is to be paid by Ryerson, is..... 21,000

But, further, in addition to the amount of the decree.. 21,000

and the amount of the bank judgment..... 8,487

the agreement says that Detmold has paid Ryerson... 4,000

and agrees to pay him the further sum of \$4000, as

the same may be required for completing the fur-

nace, to be expended by and under the direction of

. Detmold..... 4,000

These four sums amount to..... 37,487

And yet the whole sum which, by the agreement, is to

be paid by Ryerson, is..... 21,987

What, then, was the basis of the agreement? The

\$13,500, for which Ryerson gave his nine notes,

bearing the same date with the agreement, and paya-

ble at different periods..... 13,500

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and the amount of bank judgment..... \$8,487

make the exact sum of \$21,987

the payment of which by Ryerson is provided for by the agreement, and on the payment of which the assigned decree is to be assigned to Ryerson, and the judgment of the bank to be canceled.

But, for what were Ryerson's notes, for \$13,500, given? Were they given for or to secure the decree assigned to the bank? Clearly not; for the agreement says that the bank loaned \$12,000 (to Detmold) on the last eight of them; Detmold retained the first of them. It is clear, then, that Ryerson's notes for \$13,500 were given for money to be advanced on them. And that amount, with the amount of the bank judgment entered against Ryerson, amounts to the \$21,987, which, by the agreement, Ryerson is to pay.

But how much money did Ryerson get, or get the benefit of? The agreement says that Detmold paid him..... \$4,000
and agrees to pay him (in the manner above stated).... 4,000
These sums, with the amount of the judgment..... 8,487

amount to..... \$16,487

The amount to be paid by Ryerson, by the terms of the agreement, is..... \$21,987
being \$5500 more than the money he got, and was or is to get, and the amount of the judgment. For what was Ryerson to pay this additional \$5500? The answer is plain. The decree in the case of the American Life and Fire Insurance and Trust Company v. Ryerson was to be arranged, and, instead of being canceled, was to be assigned to the bank, to secure the whole money advanced, and for which Ryerson's notes for \$13,500 were taken; \$8000 of which was paid or to be paid to him, and the residue of which was to be paid for the said decree; and if \$5500 was paid for the decree, then the amount paid or to be paid Ryerson, and the amount paid for the decree, amount to the \$13,500 for which Ryerson gave his notes, and the decree was to be an additional security for the amount of the bank judgment and for the \$13,500 for which

American Life and Fire Insurance and Trust Company v. Ryerson.

Ryerson gave his notes ; this \$13,500 also including the amount paid for the decree. To carry out this arrangement, Ryerson withdraws his answers filed in the suit in this court, of the American Life and Fire Insurance and Trust Company, against him, and consents that a decree be entered therein for \$21,000. The amount required to buy the depreciated bonds of that company, to an amount sufficient to procure the assignment of the decree, was then arranged by the bank, and the assignment of it obtained ; the arrangement was completed, and the said tripartite agreement entered into. This agreement, when examined carefully, is itself, notwithstanding its involution, sufficient to satisfy us that the substance of the transaction is as above stated. But the petition of Ryerson, on which the order now sought to be vacated was made, states distinctly that such was that arrangement ; and, for the purposes of this motion, must be taken as true.

Whether there was usury in this agreement, I do not now find it necessary to express an opinion. Indeed it cannot, from the facts before us, be certainly told, as it seems to me. We are not told how much was paid to get the assignment of the decree. If \$5500 was paid for the decree, and \$8000 was paid to Ryerson, that would make the \$13,500 for which Ryerson's notes were given. This would leave the question of usury in the agreement to rest on the fact, as stated in the agreement, that \$4000 of the money was to be paid to Ryerson, as the same might be required for completing the furnace, to be expended by and under the direction of Detmold ; the notes drawing interest for the whole amount from their date. Whether there was usury in the bank judgment, we have no means of telling.

On the petition of Ryerson, so far as it rests on the allegations of usury, the order to stay the sale is not sustainable. The petition must be left, in that respect, to such other course as he may be advised to adopt. If, indeed, the property was manifestly indivisible, and the money was all due, and the party having the control of the decree (which, in the view I have taken, is to be regarded as only an additional security for the payment of the money,) was about to sell the whole property to

American Life and Fire Insurance and Trust Company v. Ryerson.

raise the whole money, and the usury was made manifest by the petition, a grave question would be presented. A party complainant in this court may have relief to the extent of the usury, though it should be held that he was not entitled to have the securities entirely defeated; and the court might order a stay of sale till the amount of the usury could be ascertained. But I do not think it necessary to go farther into this part of the case. The property is manifestly divisible, and but a part of the money is due. The decree which has been assigned to the bank is but one of the securities for the money. The court should, in my judgment, act upon the principal agreement and allow the decree to be used only so far and at such times as shall be necessary to enforce the performance of the principal agreement, and in the same way as if it had been asked to direct process of execution on that decree in view of the principal agreement. The decree, as entered, was general, that the mortgaged premises be sold to raise and satisfy the whole \$21,000, and that a *fi. fa.* issue for the sale of so much of the premises as would be sufficient to pay that sum. The officer to whom the *fi. fa.* was directed was not authorized by the decree to sell only enough to pay what was due under the terms of the agreement. When, therefore, he was about to sell the premises to pay the whole sum when only a small portion of it was due, Ryerson's only resort was an application to the court to stay the sale as proposed to be made. And I apprehend that the relief, which I think ought to be afforded on this part of the case, comes within the principle on which this court uniformly acts in ordering sales of mortgaged premises. It does not direct the whole to be sold when only one installment or portion is due, if a part of the premises can be sold to pay that installment. And, in this case, it seems to me it would be manifest injustice to sell 4500 acres of land in various tracts, and farms and dwelling houses, and a grist mill, saw mill, forge and furnace, to pay the small portion of the money that has become due under the said agreement. In *Campbell and others v. Macomb and others*, 4 *John. Ch.* 61, 534, it appeared, by the master's report, that there was due to the plaintiffs, as trustees of a charity school, on two bonds and mortgages, \$1575,

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for interest; that the principal was not yet due, but that the bonds had become forfeited at law by the non-payment of the interest; and that there was due to the complainant Campbell \$27,499.98, on two judgments; and that the mortgaged premises were manifestly indivisible and could not be sold in parcels. On this report, a decree was entered that the mortgaged premises, being a stone dam and bridge, be sold, and the proceeds be applied to pay the interest due, and then the principal of the bonds and mortgages, though not due, and the residue towards paying Campbell's judgments. Before the day of sale, the owner of the equity of redemption paid all the arrears of interest and the costs, and thereupon applied to the court for an order staying the sale, and it was granted. A petition was then presented on the part of Campbell, stating that he was personally bound as collateral security for the payment of the two bonds and mortgages; that he held two judgments against the mortgagor, for moneys advanced and for his indemnity as such security; that the obligor and mortgagor was insolvent; that the security for the principal of the mortgage debts was much impaired, the dam having been much injured by a storm, since the filing of the bill, and prayed that the mortgagor or the owner of the equity of redemption be ordered to give security to repair the dam, or pay the mortgage debt, or that the order staying the sale be vacated. In opposition to this motion, an affidavit was read, that the present owner of the equity of redemption was rebuilding the dam, and would probably finish it in two months. The Chancellor denied the motion. He said that when the premises are indivisible the whole may be sold, and the proceeds applied to pay not only the portion due but also the residue of the debt, though not due; but that this arises from the necessity of the case; and that more than is due is not to be raised out of the mortgaged premises when that necessity does not exist. It is obvious that where a part of the premises can be sold to pay what is due, the necessity of selling the whole does not exist. In that case, the Chancellor said that though there was a regular decree for the sale of the whole premises, yet there could be no doubt of the power of the court, in its discretion, to regulate the process of execution under the

decree. In that case, the necessity for the sale of the whole existed at the time of the decree; for the property was indivisible; but the Chancellor said that necessity was avoided before the sale, by the voluntary payment of what was due; and that all that the party could in conscience require was, that the decree might remain as a security for subsequent defaults, and afford him an easy and prompt remedy when they occur. He referred to the case of *Judd v. Evans*, 6 *Term Rep.* 399, showing that a court of law, after judgment and execution for the entire debt, will relieve the defendant, on his paying the installment due, retaining the judgment as a security for future installments.

In the case before us, it cannot be that there is any necessity for selling the whole of the premises to raise the amount that has become due under the agreement; and the time stipulated for the agreement may have been, and probably was, a most essential consideration with the petitioner.

The motion to vacate the order staying the sale is denied. This I suppose to be all that I am called upon to say at present. The party holding the decree may desire to answer the petition, or take some course to controvert the facts stated in it, and, thereupon, move again to vacate the order.

Motion denied.

Lewis v. Lewis.

CAROLINE LEWIS v. WILLIAM LEWIS.

1. What is not a desertion, under the act concerning divorces.
2. A wife cannot convert a husband's not contributing to the support of the family into a desertion on his part, by removing to another place and taking board and refusing to receive him.

The petitioner states that the marriage between her and the defendant took place in London, July 22d, 1834; that the petitioner resided in London at the time of the marriage. That shortly after the marriage her husband and she removed to Liverpool, where they lived about eleven months, when he left for America. That, about a year after, she followed him to America, and lived with him in New York for about four years; since which she has lived in Morristown, in this state, for nearly six years, without enjoying the society and support of her husband, though her removal to and residence at Morristown were in compliance with his wishes, and for the purpose of enabling her better to support herself and children by her own individual exertions, which her husband had wholly neglected to do. That she has four children, the eldest nearly eleven, and the youngest nearly six. That since the year 1837, she has been compelled, by her own exertions, to support herself and children. The ground on which a divorce is asked is, continued wilful and obstinate desertion for upwards of five years—*i. e.*, since February, 1841.

Mary Barrett testifies that she went to live with the parties, as nurse, in New York, about ten years ago. That for some time after she commenced living with them, the defendant made some provision for the support of the family, but that for some years before she left New York for Morristown, with the petitioner, he ceased to make any provision for the family. That during this time, he was idling away his time and showed no concern about providing for his family. He was roving around; she does not know what he was about. That he was no advan-

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tage to the family, but a great annoyance to them. That he lived in this way three or four years before petitioner moved to Morristown. The design in moving to Morristown was to be able better to support herself and children, by teaching music. Since the petitioner has lived in Morristown, the defendant has not lived in Morristown, or made any provision for the support of the family, but has lived a roving, vagabond life, traveling about, south and west. His habits were apparently slothful. The petitioner moved to Morristown in February, 1841, since which time the defendant has made no provision whatever for his family. He deserted his house and roved about the country. He was generally slovenly in his personal appearance, and showed evidence of his being idle. During all the time petitioner has lived in Morristown, and for some years previous, she has wholly provided for herself and children; having received no assistance from her husband; having provided a place of living for herself and children, and lived separate from her husband. That she, the witness, has lived with the petitioner for the last ten years, up to April, 1846.

John I. Cooper testifies that he has known the petitioner five years, since February, 1841. She came from New York to Morristown to reside, at that time, and made an agreement with witness to board with him, with her nurse and four children. She continued with him three years and better. He took it that she supported herself. He never received anything for her board except from herself. She appeared to support herself by teaching music. No provision, that he knows of, was made for her by her husband. From what he knows of him and his habits, witness don't think he was in a situation to aid her. Witness never knew him to be in any business. He was here at Morristown, at different times, a year apart. The last time witness saw him here, he said he had been off to Georgia and Cincinnati. During the whole time petitioner has lived here, up to this day, she has lived in the condition of a woman unprovided for and deserted by her husband.

J. W. Miller, Esq., of Morristown, testifies to the irreproachable character of the petitioner. That since she came to Morristown, she has supported herself and family by teach-

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ing music. That her husband, during the time she has lived in Morristown, has, to witness' knowledge and belief, furnished her with no means of support. Witness has seen him here several times, since the petitioner lived here. His only object in coming here, as witness learned from him and petitioner, was to get money from her, which she had earned by her exertions. From what witness knows of petitioner's husband and has seen of him, and from the reputation he bears, witness considers him as an idle, worthless man, pursuing no regular business, leading a wandering life, and that the petitioner's connection with him is a great detriment to herself and children. That during the whole time the petitioner has resided in Morristown, she has lived in the condition of a woman unprovided for and deserted by her husband. Witness believes that the petitioner's comfort and happiness, and the welfare and education of her children, would be greatly promoted by being divorced from her husband.

Ann E. Lery, a sister of the petitioner, testifies that she was present at the marriage; that it took place in London, in July, 1834. That witness came to America four years ago, and, shortly after her arrival, met the defendant in the street, in New York, when he immediately asked her for some money, though appearing in perfect health and able to support himself. When witness inquired of him why he deserted his wife and children and made no provision for their support, and reminded him of his good circumstances and business when they were married, he replied that he never intended to support them; that he meant, at the time of the marriage, to have his wife make a living for himself and family by teaching music. That this conversation has been repeated since. From these conversations, witness learned that the defendant had made no provision whatever for his family during the whole time he had been in America, as well as from the statements of her sister, the petitioner. When witness arrived in America, the petitioner was living in Morristown, teaching music for the support of herself and children; the defendant was not living with his wife, and witness understood from him that he had not so lived for two or three years before. When witness met and con-

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versed with defendant, as above stated, on her arrival in America, it was in the city of New York, where the defendant said he lived apart from his wife, saying that he had not lived with her for a long time. Witness has frequently visited Morristown and stayed with her said sister; that the defendant has wholly deserted and failed to make any provision for her and her children. The defendant would sometimes attempt to extort money from his wife, and collect her bills, and take away her property, and did so a number of times, greatly harassing his wife, and often writing abusive letters to her; but he never sent any means of support to his wife and children, but left them wholly to be provided for by his wife. That defendant is entirely indolent in his habits, and leads a roving, vagabond life, spending his time in the south or west; and, from information witness has received, he is now roving in Ohio and Kentucky, following a theatrical company. Witness regards him as having wholly deserted his wife, and that he will never hereafter live with her and make provision for the support of her and her children.

THE CHANCELLOR. The evidence in this case, though entirely *ex parte*, does not, as it seems to me, make out a case of desertion, within either the letter or spirit of our statute. Desertion, to be a cause of divorce, must be a willful, continued and obstinate desertion for five years. In this case, the parties were married in London, in July, 1834. Shortly after their marriage, they removed to Liverpool, where they lived about eleven months, when the husband came to America. In about a year the petitioner came to this country, and they lived together in the city of New York, till February, 1841. The petitioner states that, for the first year after she came to this country, he contributed partially to the support of the family, out of funds then in his hands; but that, since the year 1837, she has been compelled by her own exertions to support herself and children, he having never done any business since he arrived in America. The petitioner states that her removal to Morristown and residence there were in compliance with his wishes, and for the purpose of enabling her better to support

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herself and children by her own exertions. It is not shown, either by the petition or proofs, whether he went with her when she went to Morristown. The witness Cooper states that she came to Morristown in February, 1841, and made an agreement with him to board with him, with her nurse and four children. Whether he went with her or not, when she first went to Morristown, it is clear that her going there with his consent and for the purpose stated, was not a desertion on his part. She had supported herself and him and the children, for some time before she left New York ; and she went to Morristown to obtain a better support, the petition says, in compliance with his wishes.

Was it understood between them that he was to go to Morristown too, or was it agreed between them that he was to remain in New York, or go elsewhere, and support himself? Was he to visit her at Morristown, or did she forbid his visiting her there? There is nothing to show that there was anything like desertion on his part when she left New York for Morristown. Has anything since occurred amounting to a desertion on his part? The testimony shows he has been at Morristown several times since she went there ; and it does not tell us whether she received him, or refused to receive him, because he was in no business, or was idle, and contributed nothing to her support or that of the children. Was that a desertion on his part? The same kind of desertion had taken place before she left New York ; for he had not contributed to the support of the family for some time before that. A wife cannot convert a husband's not contributing to the support of a family into a desertion on his part, by removing to another place and taking board and refusing to receive him there. The case seems to be nothing more nor less than an application by the wife for a divorce on the ground that the husband is idle, and contributes nothing to her support or that of the children, and that she is obliged to support herself and them, and is unwilling that her earnings should support him.

It seems to me it would be a dangerous precedent to decree a divorce in this case. The prayer of the petitioner is therefore denied.

Bray v. Bray.

DAVID BRAY v. MARY ANN BRAY.

1. Alimony allowed the wife pending a suit by the husband for a divorce for alleged adultery, on the denial by the wife, under oath, of the adultery.

2. The answer of the wife should be put in without oath, and the denial of the adultery should be introduced in the petition for alimony, and the petition be under oath.

THE CHANCELLOR. The bill in this case is filed by the husband for a divorce, on the charge of adultery. The wife has put in an answer denying the adultery, and has filed her petition for alimony during the suit, and for a reasonable allowance for counsel fees and expenses, to enable her to defend the suit. The answer and petition are both under oath. Our statute provides that answers to bills for divorce shall not be under oath. But on application by the wife for alimony *pendente lite*, and an allowance to enable her to defend the suit, when the bill is filed by the husband and charges adultery, the oath of the wife, denying the charge of adultery, seems to be required to entitle her to alimony and allowance. I think the correct practice would be to file the answer without oath, and to introduce into the petition for alimony a distinct denial of the adultery, and swear to the petition. I shall consider the adultery as sufficiently denied in this case.

The defendant is entitled to alimony *pendente lite*, and to a reasonable allowance to enable her to defend the suit. 2 *Paige* 109 ; 3 *Johns. Ch.* 519 ; 1 *Paige* 83 ; 2 *Ib.* 621.

The court sometimes fixes the alimony without a reference, where affidavits on both sides have been presented for the purpose of enabling the court to fix the amount. It has not been done in this case, and there must, therefore, be a reference.

Order accordingly.

CITED in *Marker v. Marker*, 3 *Stockt.* 258.

Bylandt v. Bylandt.

VANDEN BYLANDT v. VANDEN BYLANDT.

1. The affidavit on which the application for a *ne exeat* was made in a divorce case, was made before the petition for divorce was filed.

2. *Ne exeat* denied. The proper course stated.

On petition for divorce from bed and board, for cruel treatment, and stating that the husband designs quickly to leave the state without making any provision for the support of the petitioner, and praying a *ne exeat*. The usual affidavit on petitions for divorce is subjoined to the petition, and was made November 12th, 1846. Annexed to the petition is an affidavit of one Romein, showing the intention of the husband to leave the state and abandon the petitioner. His affidavit is also made November 12th, 1846. The petition had not been filed on the same day.

G. S. Van Wagener, for the petitioner, moved for a *ne exeat*.

THE CHANCELLOR. It would be irregular to grant the *ne exeat* under these circumstances. There was no cause or proceeding in court respecting the subject of the affidavit made by Romein when it was made. 1 *Beat*. 327.

The proper course is to file the bill or petition for divorce, and after that to file a petition for the *ne exeat*, supported by the necessary affidavit, sworn subsequently to the filing of the bill.

Motion denied.

Van Sickle v. Ayres.

VAN SICKLE v. AYRES.

If, when a payment is made by one to another to whom he is indebted on bond and mortgage, and on other accounts, the debtor makes no special appropriation of the payment to the bond and mortgage, the creditor may apply it to the other account.

The bill in this case is for the foreclosure of a mortgage, dated June 17th, 1843, given by the defendant to the complainant, for \$1000, payable April 1st, 1844, with interest. The answer admits the giving the bond and mortgage, and sets up that on or about January 25th, 1845, he gave the complainant an order on Jonas Roloson, for about \$19.44, on which the complainant received the money; and that it was understood between him and the complainant, when the order was given, that the said sum was to be applied by the complainant as a payment on the said bond and mortgage. That on or about April 2d, 1845, he sold, and delivered to the complainant 10 sheep, for \$22.50, which was to be applied by the complainant as a payment on the bond and mortgage. That on or about April 14th, 1845, he, at the request of the complainant, assumed and paid for him to Britton Ayres about \$21.38, which the complainant promised to apply as a payment on the bond and mortgage. That on or about March 29th, 1845, he, at the request of the complainant, gave the complainant his, the defendants' note, for about \$60, which was given by the defendant and received by the complainant to be applied as a payment on the bond and mortgage; and that afterwards he, the defendant, paid the note. And he says he was informed by the complainant, and believes it to be true, and therefore charges, that the said note was afterwards transferred and delivered by the complainant to Azariah Lewis, in payment for a wagon bought by the complainant of Lewis. That on or about May 15th, 1845, he, at the request of complainant, assumed and paid for him to Henry Fountain about \$25, which the complainant promised to apply as a payment on the bond and mortgage. That the complainant is indebted to him \$3 for gate-age, for the passage through a gate belonging to the defendant,

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on the Paterson and Hamburgh turnpike, from April 1st, 1842, to April 1st, 1845.

The defendant exhibited interrogatories to the complainant, inquiring as to the several matters set up as payments, and whether it was not the understanding between them that the several items should be applied by the complainant as payments on the bond and mortgage. The complainant admits the receipt of the several amounts as stated in the answer, except that the sum which he requested the defendant to pay to Britton Ayres for him was but \$20, instead of \$21.20, as stated in the answer; and except his gateage, which he denies owing to the defendant; but the complainant answers to the interrogatories, that the said several payments were made by the defendant to be applied on other unsettled accounts which the complainant had against him; and that it was so understood between them, when the payments, respectively, were made; and that neither of them was directed by the defendant, or received by the complainant, to be applied as payments on the bond and mortgage. No testimony was produced on the part of the defendant.

The case was submitted without argument.

THE CHANCELLOR. If, at the time of the making of the several payments claimed by the defendant to have been made, he was indebted to the complainant on other accounts, there being no proof that the defendant made any special appropriation of the payments to the bond, the complainant had the option to appropriate them towards the payment of his other account against the defendant.

Let it be referred to a master, to inquire and report whether, at the time of the several payments, the defendant was indebted to the complainant on other accounts; and whether the payments made by the defendant are more or less than sufficient to pay such other indebtedness; and to ascertain what is due the complainant on the bond and mortgage, after crediting thereon the surplus, if any, which shall be found to remain of the payments, after discharging such other indebtedness; the defendant to be permitted to make any other proof of the said payments which he may think necessary.

Order accordingly.

WILLIAM WINTERS v. PETER D. HENDERSON ET AL.

1. When a mortgagor, after giving the mortgage, sells to a third person a part of the mortgaged premises, the part remaining in the mortgagor should, in a decree for sale, be directed to be sold first.

2. On a foreclosure bill in such a case, a decree was taken in the general form for the sale of so much of the mortgaged premises as would be sufficient to pay the debt, and a *fi. fa.* was issued to the sheriff, commanding him, in the terms of the decree, to make sale.

3. On the petition of one of the defendants, a purchaser from the mortgagor of a part of the premises, and the facts therein stated, an injunction was allowed, restraining the sheriff from selling the part which had been conveyed to this defendant until the further order of the court; and it was subsequently directed that the part remaining in the mortgagor should be first sold.

On the 3d December, 1824, John Winters gave to Joanna J. Shawger a mortgage on four lots separately described in the mortgage. On the 8th August, 1827, the mortgage was assigned by the mortgagee to William Winters, the complainant. On the same 8th August, 1827, the tract first described in the mortgage was conveyed to Peter D. Henderson. On the 24th September, 1830, the administrator of the mortgagor conveyed the three other tracts described in the mortgage to J. J. Shawger, the original mortgagee, who had previously assigned the mortgage as aforesaid. John Smith and Richard R. Smith are in possession of the said three tracts, claiming title under deeds from J. J. Shawger and the heirs-at-law of the mortgagor.

The bill was filed June 19th, 1845, by William Winters, for the foreclosure of the mortgage and sale of the mortgaged premises, against Henderson and his wife, and the Smiths and their wives.

The Smiths filed a demurrer to the bill, Henderson and wife failed to appear, and a decree *pro con.* was entered against him on the 18th September, 1845. The demurrer of the Smiths was overruled December 16th, 1845. They neglected to answer; and in March, 1846, without any order of reference to a master, for the purpose of getting a report how the property should be sold, a final decree was taken against all the defendants, in the general form, for the sale of so much of the mortgaged prem-

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ises mentioned in the bill as would be sufficient to satisfy the mortgage; and a *fi. fa.* was issued to the sheriff, commanding him to make sale.

On the 29th August, 1846, Henderson filed his petition, stating that, immediately after the service of the subpœna on him, he, being ignorant of the character of the process and of his duty under it, and believing it to be necessary for him personally to appear at Trenton, to answer the command thereof, and residing in a thinly-settled part of the county of Morris, made preparations to go to Trenton, according to the command of the process. That on his way to Trenton, passing through the village of Rockaway, in Morris county, he applied to L. A. Chandler, Esq., a solicitor of this court, and showed him the copy of the subpœna, and told him he was on his way to Trenton to answer the same. That he had been in the habit of advising with said Chandler in legal matters, and relied on him for such directions as were necessary to defend the suit. That Chandler told him it was unnecessary for him to go to Trenton at all to answer the subpœna. That relying on this information, and being unacquainted with proceedings in chancery, and unable to read or write, and being ignorant of any such mortgage, he desisted from going to Trenton, and went home, and laid the subpœna by, believing it was unnecessary for him to take any steps to answer it; and that, if it was necessary for anything to be done by him, the said Chandler would inform him. That he frequently saw Chandler afterwards, but that he did not, nor did any other person inform the petitioner that it was necessary for him to defend the suit in any way; nor did he know, suppose or believe it was necessary to do so till after he heard that the land was advertised for sale by the sheriff. The petitioner then states, that the sealed bill, to secure which the mortgage was given, was paid by John Winters, in his lifetime, to J. J. Shawger, in her lifetime, before the mortgage was assigned to William Winters; and that the sealed bill remained in the possession of one John Hardy, administrator, &c., of J. J. Shawger, till a very short time before the bill was filed, and was never assigned by the said Hardy to the complainant. The petition then states the proceedings had in the cause; that under the *fi. fa.* the sheriff had

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advertised all the lands mentioned in the bill for sale on the 31st August, 1846, and when applied to by the solicitor of the petitioner, said he expected to sell the land so conveyed to the petitioner, as set out in the bill, first, to raise and satisfy the amount due on the said execution; that when he, the petitioner, purchased the said first-described tract, on the 8th August, 1827, \$200, the consideration mentioned in his deed from the said John Winters and his wife, the mortgagors, was a full and fair price for the said first-described tract; and that the said John Winters and wife conveyed the same to him in fee simple; Winters warranting in the deed that it was free from encumbrance, and that he would warrant the same to the petitioner against all persons whatever, free from all manner of encumbrance; and that the said deed to the petitioner was recorded July 1st, 1828. The petition states that the proceedings and decrees in the said foreclosure suit were a surprise upon him; and insists that the final decree is irregular, inasmuch as it appears, by the complainant's bill, that the conveyance of the three last-mentioned tracts was subsequent to the conveyance of the first tract to the petitioner, and that said three tracts are liable to be first sold to pay the mortgage; that he gave a note with security for the \$200, the consideration for the tract bought by him, which note was afterwards paid, under the firm belief that the tract so bought by him was free from all encumbrance.

The petitioner prays that the decree may be set aside or opened, and the petitioner be permitted to answer the bill, or that a reference may be ordered, to ascertain the priority of the conveyances, and whether the mortgaged premises can be sold in parcels, and that the decree may be so amended as to order the parts of the mortgaged premises not belonging to the petitioners to be first sold. The petition was sworn to in the usual form, the petitioner subscribing it by his mark.

A copy of this petition, and of a notice of the motion to the court, were served on the solicitor of the complainant and on the solicitor of the Smiths.

On reading the foregoing petition, and a further petition stating the service of a copy thereof, and of the said notice as aforesaid, and that the complainant's solicitor and the sheriff threat-

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ened, notwithstanding, to proceed to sell the lands of the petitioner, and praying an order staying the sale till the further order of the court, an order was made staying the sale.

P. D. Vroom moved to open the decree, and cited 7 *Paige* 509.

E. W. Whelpley, on behalf of the complainant, cited 2 *Green Ch. R.* 451.

He read an affidavit made by Richard R. Smith, stating that, before the time for answering had expired, he, for himself and wife, and in behalf and by authority of John Smith and wife, in order to save the costs of putting in an answer, as they otherwise would have done and intended to do in case the arrangement had not been made, arranged and agreed with the complainant's solicitor, that no answer should be put in by the Smiths, provided that part of the mortgaged premises which was in Henderson's possession should be first sold, which arrangement was entered into between him and the complainant's solicitor; that, at the time of the said arrangement, he believed that those parts of the premises claimed by and then in the possession of the Smiths were not liable to the payment of the mortgage debt, by reason of the said mortgage having been paid off; and considered and believed that if Henderson did not and would not resist the suit, the part of the premises claimed by him, and in his possession, ought to be first sold, and would be sufficient to pay the decree and costs; that if the decree be opened, he believes that they, the Smiths, can satisfy the court that the mortgage had been paid off long before the filing of the bill; that if the Smiths should, unexpectedly, fail in the making such proof, the deponent verily believes that, on a reference to a master as to priorities, the said Smiths can establish by proof that, as between them and Henderson, the part in Henderson's possession should be first sold to pay the mortgage.

Mr. Whelpley said that he made no bargain or arrangement with the Smiths; that their solicitor said to him that Henderson had agreed to pay the mortgage, and that the proper course was to sell Henderson's part first. The contest was between the defendants, and he, Mr. W., was not bound to settle

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the difference between them. All Henderson is entitled to is to have it referred to a master, to report how the property should be sold. If he is not right in this, yet the court should not open the decree except on payment of costs ; and Henderson should be confined to the case he makes by his petition, that is, that the mortgage has been paid off. He should not have leave to make any other defence.

Mr. Vroom replied.

THE CHANCELLOR. If the debt secured by this mortgage is still subsisting, the lands last conveyed are liable to be first sold to pay it. So far, then, as relates to this mortgage debt, and the estate of the mortgagor, and the rights of Henderson as against that estate, the administrator of the mortgagor could only sell the three tracts, subject to the whole mortgage. These three tracts were in the hands of the purchaser from the mortgagor's administrator, subject to the same equity in favor of Henderson that they were subject to in the hands of the mortgagor. I think Henderson is entitled to relief. Without putting the action of the court on his ignorance, but charging him with full knowledge of the mode of proceeding in a foreclosure suit, and allowing him full knowledge of his equities, as we must also do, he had just grounds for relying that such course would be taken as to subject the three tracts last conveyed to be first sold ; and it appears to me that on the facts stated in the bill and the decree as it stands, it would have been proper for the complainant's solicitor to direct the sheriff to sell those three tracts first. But it seems the Smiths now make difficulty ; and Henderson seems to have just ground to apprehend that his tract may be sold first. The question is as to the mode in which relief can be extended to Henderson. I say to Henderson, for I see no principle on which any relief can be extended to the Smiths. Indeed they have asked none. But if they had, the only relief they could have asked would have been the opening of the decree, and permitting them to answer and set up that the debt was paid. On what ground could they ask the court to open the decree ? They appeared and demurred to the bill, and after their demurrer was overruled failed to answer.

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Nay, they say they intended to answer, and would have done so and have set up that the mortgage was paid, if they had not thought they had made an arrangement with the complainant's solicitor, that Henderson's tract should be sold first. Now the only defence that would have answered their purpose would have been that the mortgage had been paid ; and if they had so little confidence in that defence, or so little regard for the rights of Henderson, as, instead of answering, to take their chance of including the sheriff, or the complainant's solicitor, to sell Henderson's tract first, I do not see that the court ought, or that it can, on any recognized principle in regard to opening decrees, open this decree in their favor. I do not see that, at present, there is any need of inflicting on either of the parties the expense of opening the decree, or of a reference. The bill states the facts sufficiently, and, as against the Smiths, it should stand as confessed. I see no objection to making an order on the sheriff to sell the three tracts last conveyed, first. There can be no doubt they will bring enough to pay the debt. If they should not, the matter may be again agitated, and the court will decide whether the decree shall be opened to let Henderson in to defend. If it be said, on the part of the Smiths, that the court should not interfere at all, unless it opens the decree and gives them an opportunity to defend, I do not think they stand in a position to ask that of the court.

Order accordingly.

CITED in *Weatherby v. Slack*, 1 C. E. Gr. 493.

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THE NEW YORK CHEMICAL MANUFACTURING COMPANY v.
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1. A *bona fide* assignee of a mortgage first in execution and registry, without notice of an agreement under seal between the first and second mortgagees, that the second mortgage shall be considered and held to be the prior encumbrance, no charge being made in the registry of the mortgages, has an equity superior to that of the second mortgage under such an agreement.

2. The language of an answer scrutinized.

The bill in this case, filed January 18th, 1843, is for the foreclosure of a mortgage, dated March 18th, 1830, given by A. Peck to Samuel Condit, to secure the payment of a promissory note, of the same date, given by Peck to Condit, payable on demand, for \$1500, with interest. The bill states that on the 20th September, 1842, Condit, by an assignment endorsed on the mortgage, for a valuable consideration to him paid by the complainants, assigned to them the mortgage and the note referred to therein. That the complainants have heard and believe it to be true, that Peck, on or about May 1st, 1830, executed another mortgage on the said property and other property, to Samuel Dodd, to secure \$2400; that Dodd had since died intestate, and administration of his personal estate has been granted to Caleb Baldwin and Jemima Dodd. That Peck, on or about February 15th, 1831, sold and conveyed the said property to William Peck and Elijah C. Pierson, who now own it. That on the 14th April, 1840, John Taylor recovered a judgment in the Circuit Court of Passaic, against A. Peck, C. R. Akers, Elijah C. Pierson, Samuel Condit and William Peck for \$111.94, and on the 20th October, 1840, another judgment in the said court, against the same persons, for \$2500.48. That on the 20th October, 1840, Jonas Smith recovered a judgment in the said court against A. Peck, William Peck, Lewis Dodd and Samuel Condit, survivors of Samuel M. Dodd, for \$794.53. That on the 27th October, 1841, Isaac Baldwin recovered a judgment in said court, against William Peck, Elijah C. Pierson and Samuel Condit, for \$1686.78. That the board of chosen freeholders of the county of Essex had a verdict or recovered a

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judgment against the said A. Peck, William Peck, Samuel Condit and others, in the Circuit Court of Essex, in 1841, for \$5773.51, besides costs. That Mann & Hendrick recovered a judgment against the said William Peck, in the said court, on the 9th November, 1842, for \$232.45. That on the 9th November, 1841, James Manell recovered a judgment, in the Supreme Court, against William Peck, Elijah C. Pierson and Samuel Condit, for \$510.50, besides costs. That on the same day, Elias Tomkins recovered a judgment, in the same court, against the same persons, for \$413.28, besides costs. That on the 22d February, 1842, Jonas Smith recovered a judgment in the same court, against A. Peck, William Peck, Lewis Dodd and Samuel Condit, survivors of Samuel M. Dodd, for \$761.83. That on the same day, John Taylor recovered a judgment, in the same court, against A. Peck, C. R. Akers, Elijah C. Pierson, Samuel Condit and William Peck, for \$1976.64, besides costs. That on the 10th May, 1842, Isaac Baldwin recovered a judgment in the same court, against William Peck, Elijah C. Pierson and Samuel Condit, for \$1652.19, besides costs. The bill charges that the said Samuel Dodd, E. C. Pierson, William Peck and the said several judgment creditors, had notice of the complainant's mortgage, and that they, severally, took their mortgage, deed and judgments subject to the mortgage of the complainants; and that they knew it was unsatisfied. That, before filing this bill, the complainants have called on the said A. Peck, and demanded payment of the said note, and he refused to pay the same; and that the complainants are informed and believe that he is insolvent and unable to pay his debts.

The administrators of Samuel M. Dodd, deceased, (in the bill called Samuel Dodd,) put in an answer to the bill, admitting the indebtedness of A. Peck to Samuel Condit, and the giving of the note and mortgage, and the record of the mortgage, and the assignment, for a valuable consideration, of the note and mortgage by Samuel Condit to the complainants, and the record of the assignment; and stating that on the 1st of April, 1830, A. Peck, being indebted to Samuel M. Dodd, since deceased, in \$2400, made his note, of that date, for the said sum, payable to the said Samuel M. Dodd, or order, on demand, with interest;

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and that on the 1st of May, 1830, to secure the said note, the said A. Peck executed and delivered to the said Dodd his mortgage, of the last-mentioned date, on certain lands therein described, (describing them,) which mortgage was acknowledged on the 15th and recorded on the 18th of September, 1830, at 5 minutes after 4 P. M. That the lot first mentioned in this mortgage is the same land and premises described in the mortgage set out in the complainants' bill. That Samuel M. Dodd died October 24th, 1831, intestate; that on the 20th November, 1831, administration of his personal estate was granted to these defendants, and that the said note and mortgage to the said Samuel M. Dodd came into the possession of such administrators. They admit that A. Peck, on or about February 15th, 1841, sold and conveyed to William Peck and Elijah C. Pierson the said land and premises described in the mortgage set out in the complainants' bill, and first described in the said mortgage to Samuel M. Dodd; and that said William Peck and Elijah C. Pierson were the owners of the same at the time of the filing of the complainants' bill. That on or about August 26th, 1836, while the said Samuel Condit was the holder of the mortgage so given by A. Peck to him, these defendants released the lot secondly described in the said mortgage to Samuel M. Dodd to the owners thereof, according to law, from the operation and lien of the said mortgage held by the defendants; and that the said release was made with the knowledge, approbation and consent of the said A. Peck and the said Samuel Condit. That afterwards, on the said August 26th, 1836, the said Samuel Condit still being the holder of the said note and mortgage given by A. Peck to him, and these defendants being still the holders of the said note and mortgage given to their said intestate, the said Samuel Condit made and entered into an agreement in writing, under his hand and seal, to and with these defendants, of the date last mentioned, whereby he stipulated and agreed for the consideration therein expressed and referred to, to and with these defendants, that the said Samuel M. Dodd mortgage should be considered and held as the first lien on the lot described in the mortgage from Peck to Condit, notwithstanding the prior date and execution of the said mortgage from Peck to the said Condit; which said

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agreement, with its recitals, is of the following purport and effect, that is to say, (setting it out.) It recites the two mortgages, giving their dates; and states that he, the said Condit, has, for certain good causes and considerations, agreed to give priority to the mortgage to Dodd, and then, in consideration of the premises, and of \$1 to him paid, consents, covenants and agrees to and with the said administrators, &c., of Samuel M. Dodd, that the Dodd mortgage shall be considered and held as the prior lien, &c. The answer then states that this agreement was made and entered into by Condit with a full knowledge that these defendants had made the release herein before mentioned, and of the effect and purport thereof; and with the full knowledge and approbation of the said A. Peck, William Peck and Elijah C. Pierson, at the time of the making thereof.

By the consent of the solicitors of the respective parties, the affidavit of A. Peck, one of the defendants, was read on the hearing. He states that he was discharged as a bankrupt, March 31st, 1843. That the agreement of Samuel Condit, (being the agreement that the Dodd mortgage should be held and considered the first lien on the premises described in the mortgage to Condit, and which was assigned to the complainants,) was made and delivered by him to the administrators, &c., of Dodd, at the instance and request of William Peck and Elijah C. Pierson, to induce, and as a consideration to the said administrators to make and deliver the release to John Peck; John Peck being then the owner of the part released to him, and the said William Peck and Elijah C. Pierson being then the owners of the residue of the mortgaged premises. That the making and delivering of the said agreement was the only inducement or consideration for the execution and delivery of the said deed of release; that the said agreement and deed of release were made, executed and delivered respectively, on or about the day they bear date, in good faith, and for the consideration aforesaid, and with the full purpose and expectation of all the parties thereto, as declared by them at the time, to give priority to the mortgage of the said administrators over that of the said Samuel Condit.

John Q. Jones, sworn for the complainants, says he was cashier of the New York Chemical Manufacturing Company during

the whole month of September, 1842, and for some years previous; that the said company took the said note and mortgage, (the note and mortgage to Condit,) for a full and valuable consideration, as cash; they were taken by order of the board of directors of the said company; the whole of the negotiation and the purchase of assignment of said note and mortgage was made by him, the deponent, in behalf of the said company. That prior to and at the time of making the agreement for the purchase of said note and mortgage, it was represented to him, as cashier for the complainants, that the said mortgage was the first encumbrance on the property described in it. He so represented it to the board of directors, and the board took it on that understanding. That the complainants would not have taken this mortgage but for the representations made to them that it was the first encumbrance. That the complainants first heard of the secret agreement made by Samuel Condit to give priority to the Dodd mortgage after the filing of the bill in this cause.

A. S. Pennington, for the complainants, He cited 6 *Cowen* 147; *John. Ch. Rep.* 441, 479; 1 *P. Wms.* 497; 1 *Eq. Cas. Ab.* 321; 2 *Vern.* 726; 6 *Ves.* 192; 13 *Ib.* 132; 3 *Russel* 1; 2 *Simons* 75; 2 *Vent.* 337; 2 *Dessau.* 519; 1 *Dow's Rep.* 50; *Pow. on Mort.* 295; *Talbot* 187; 1 *Atk.* 571; 7 *Halst.* 116; 2 *Pick.* 184; 4 *Taunton* 683; 6 *Cranch* 133; 1 *Sumner's Rep.* 509; 2 *Wash. Rep.* 233, 255; 1 *Munf. Rep.* 533; 8 *Cowen* 260; *Saxton* 461; *Story's Com. on Eq.* 372, 7, 9; 1 *Fonbl. Eq.* 206, 266; 19 *East* 66, 71.

A. C. M. Pennington, for the defendants. He cited 2 *Story's Eq.* 362; 3 *Meriv.* 86; 2 *Vern.* 692, 764; 1 *Ves.* 122; 1 *Ves., Jr.*, 247; 4 *Ib.* 7, 12; 1 *Harr. & John.* 320; 3 *Monroe* 432; 1 *Dallas* 23; 2 *Murphy's Rep.* 30; 1 *Paige* 319; 12 *Wheat.* 605; 6 *Cond. U. S. Rep.* 662; 3 *Ib.* 554; 1 *Wheat.* 233; 9 *Cowen* 409; 5 *Ib.* 353; 2 *Yeates* 23; 2 *John. Rep.* 595; 1 *Pen. Rep.* 23; 6 *Halst.* 116.

THE CHANCELLOR. On the 18th March, 1830, Aaron Peck gave his note of that date to Samuel Condit, for \$1500, payable on demand, with interest; and, to secure the payment of it, executed and delivered to Samuel Condit a mortgage, of the

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same date, on a tract of land in Orange. On the 1st May, 1830, A. Peck executed and delivered to Samuel M. Dodd a mortgage to secure the payment of a note given by Peck to Dodd, for \$2400, payable to Peck or order, on demand, with interest. This second mortgage covered the tract contained in the first mortgage and another tract of land. On the 15th February, 1831, A. Peck conveyed both tracts to William Peck and Elijah C. Pierson; and it would seem that William Peck and Elijah C. Pierson afterwards conveyed to John Peck the second tract mortgaged to Dodd, and which was not mortgaged to Condit. Samuel M. Dodd died in October, 1831, and administration of his personal estate was granted to Caleb Baldwin and Jemima Dodd. On the 26th August, 1836, the administrators of Samuel Dodd released the lot secondly described in their mortgage from the operation and lien of their mortgage. The answer of the administrators says that the release was made to the owners thereof according to law; and that the release was made with the knowledge, approbation and consent of A. Peck and of Samuel M. Condit. Afterwards, on the said 26th August, 1836, (in the language substantially of the answer), the said Samuel Condit made and entered into an agreement in writing under his own hand and seal, to and with the defendants, of the date last mentioned, whereby he stipulated and agreed, for the considerations therein expressed and referred to, to and with the defendants, (the administrators), that the said Dodd mortgage should be considered and held as the first lien on the lot described in the mortgage to Condit, notwithstanding the prior date and execution of his, Condit's, mortgage. The answer says that this agreement was made and entered into by Condit with a full knowledge that the said defendants had made the said release, and with the full knowledge and approbation of the said A. Peck, William Peck and Elijah C. Pierson. The agreement states the two mortgages, and that he, Condit, had agreed, for certain good causes and considerations, to give priority to the Dodd mortgage; and then, in consideration of the premises and of \$1, to him paid, consents, covenants and agrees to and with the said administrators of Samuel M. Dodd, deceased, that the Dodd mortgage shall be considered and held to be the prior lien. In

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April, 1840, a judgment for \$1114.94, and in October, 1840, another judgment for \$2500, were recovered by John Taylor, both against A. Peck, C. R. Akers, Elijah C. Pierson, Samuel Condit and William Peck. On the 20th October, 1840, Jonas Smith recovered a judgment against A. Peck, William Peck, Lewis Dodd and Samuel Condit, survivors of Samuel M. Dodd, for \$794.53; and other judgments for large amounts were recovered, in 1841, against the said Peck, Pierson and Condit. In February, 1842, Jonas Smith recovered another judgment against A. Peck, William Peck and Lewis Dodd, deceased, for \$761.83; and on the same day, John Taylor recovered a judgment against A. Peck, C. R. Akers, Elijah C. Pierson, Samuel Condit and William Peck, for \$1976.64; and on the 10th May, 1842, Isaac Baldwin recovered a judgment against William Peck, Elijah C. Pierson and Samuel Condit, for \$1652.19. On the 20th September, 1842, Samuel Condit, by an assignment endorsed on the said mortgage given by A. Peck to him, stating his assignment to have been made for a valuable consideration to him paid by the complainants, assigned his said mortgage to the complainants and the note referred to therein. On the 15th February, 1843, the complainants, as assignees of the Condit mortgage, filed their bill for the foreclosure of that mortgage and the sale of the premises under it, as the prior encumbrance, making the administrators of Samuel M. Dodd parties defendant as subsequent mortgagees. These defendants set up the agreement of Condit before stated, that the Dodd mortgage should be considered the prior encumbrance.

There can be no doubt that if Condit had not assigned his mortgage, but had himself filed the bill for foreclosure, the court would have given effect to his agreement under seal, if produced by the administrators of Dodd; that the Dodd mortgage should be considered and held to be the first lien, whether that agreement was considered as only a covenant or as something more. Nor can there be any doubt that the assignee of a bond and mortgage takes them subject to all equities existing in favor of the mortgagor against the mortgage. But the question involved in this case is, whether when there are two mortgagees, one prior and the other subsequent, and the subsequent mortgagee

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takes from the prior mortgagee a writing under seal, that the subsequent mortgage shall be considered and held to be the prior encumbrance, but no change is made in the registry of the mortgages, and the mortgagee whose mortgage is prior in date and registry afterwards assigns his mortgage to a *bona fide* assignee without notice of the agreement between the two mortgagees, the subsequent mortgage is to be considered the prior encumbrance as against such assignee. This is the statement of the question on the supposition that the subsequent mortgagee setting up the agreement and the assignee of the mortgage first in execution and registry are both innocent. On this question, I am strongly inclined to the opinion that the *bona fide* assignee of the mortgage first in execution and registry, without notice of the agreement between the mortgagees, has the better equity; and that the mortgage so assigned to him should be decreed to be, in his hands, the first encumbrance; and that the subsequent mortgagee should be left to his action against the first mortgagee for a breach of covenant. If such an agreement should be held to be equivalent to the actually putting the second mortgage first, notwithstanding the registry to the contrary, then the second mortgagee, by procuring such an agreement and permitting the registry to remain unchanged, puts it in the power of the first mortgagee, and is active in so putting it in his power, to inflict a loss on an innocent assignee of the first mortgage. No diligence on the part of any one about to take an assignment of the first mortgage would protect him, or apprise him of danger. If he goes to the mortgagor to inquire of him if he has any equities against the mortgage, he is answered No, and that the money is all due. If he goes to the records, he finds that the mortgage he is about to take is the first encumbrance. These are the only sources of inquiry to which he can apply. The information he receives is satisfactory, and he takes the mortgage. When he comes to foreclose his mortgage, if the second mortgagee produces an agreement between him and the first, that the second mortgage shall be considered and held to be the first, I think the assignee could truly and justly answer that that did not make it the first; that the first mortgagee still kept it in its place as the first, in breach of his agreement, and that he, the second mortgagee,

must resort to his remedy on the agreement. Indeed, I do not see that, unless there be a change in the registry, there could be anything but a covenant between the two mortgagees. The recording of such an agreement would not have the effect of putting the second mortgage first as against third persons. What could lead a third person, searching for mortgages against a mortgagor and the priorities of them, to look for an agreement between the mortgagees inverting the order of registry? There has been no effort on the part of the defendants to question the *bona fides* of the assignment to the complainants, or their want of notice. It seems, on the contrary, to be admitted by the answer. Under these circumstances, and supposing the defendants to be equally innocent in other respects, the loss, I think, should fall, (if any is to be sustained,) on the defendants, the second mortgagees. They should be left to their remedy on the covenant. On principle, the case seems to me to be with the complainants; and several adjudged cases referred to on the argument sustain the principle. In *Murray and others v. Lylburn and others*, decided by Chancellor Kent, 2 *John. Ch. Rep.* 441, one Winter held certain lands in trust. The *cestui que trust* filed a bill against Winter, the trustee, charging him with a breach of trust, and obtained an injunction restraining him from acting as trustee, and from selling any of the trust estate or assigning any securities. Winter, notwithstanding, sold part of the trust estate to Sprague, and took his bond and mortgage for the purchase money, and afterwards assigned Sprague's bond and mortgage to Lylburn. The question was, whether Lylburn, the assignee, was accountable to the *cestui que trust* for the bond and mortgage, as Winter, the assignor, would have been had he kept it. No doubt the bond and mortgage in the hands of the assignee, Lylburn, were subject to any equities existing in favor of Sprague, the mortgagor, against Winter, the mortgagee and assignor. But the bond and mortgage in Winter's hands were subject to another equity; not an equity of the mortgagor, but an equity of a third person, the *cestui que trust*, who could have subjected them, in Winter's hands, to the trust; as, in the case before us, the administrators of Dodd might, by virtue of the agreement, have postponed Condit's mortgage to

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them, if it had remained in Condit's hands. The question was, whether the bond and mortgage in the assignee's hands, was subject to such an equity of a third person, not a party to them, because they were subject to it in the hands of the assignor. The Chancellor said that the rule that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor, is generally understood to mean the equity residing in the obligor or debtor, and not an equity residing in some third person against the assignor. That one about purchasing a bond from the obligee can always go to the obligor and ascertain what claims he may have against the bond; but that he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee; that he has no object to which he can direct his inquiries; and that, for this reason, the claim of the assignee, without notice, was preferred in the late case of *Redfern v. Ferrier*, 1 Dow 50, to that of a third party setting up a secret equity against the assignor, thus sanctioning the decision in *Dow*, in which Lord Eldon said that if it was not to be so, no assignments could ever be taken with safety. The case we have in hand is much stronger in favor of the *bona fide* assignee than the case put by Chancellor Kent. The holders of the Dodd mortgage are chargeable with permitting the registry to remain unaltered, to mislead an innocent person; and besides, they have a covenant from the other mortgagee, which was broken by his assignment, if the assignment is good and the mortgage first in execution and registry is entitled to preference. In *Moore v. Holcombe*, 3 Leigh 597, Holcombe sold land to Moore, and took no security for the purchase money. Moore then sold the land to F. and took his bond for the purchase money; then assigned the bond to a *bona fide* assignee having no notice of Holcombe's claim to a lien on the land for the purchase money due from Moore to him. It was held that though the bond, in the hands of Moore, the assignor, might have been subject to Holcombe's equity, yet that Holcombe could not assert his equity against Moore's assignee of the bond; that though a bond, in the hands of an assignee, is subject to any equity of the obligor, it is not subject to any equity of a third person not a party to the bond of which he had no

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notice. The case of *Dearle v. Hall*, 3 *Russell* 1, is authority for the complainants in this case. One having a beneficial interest in money in the hands of trustees, assigns it to A, but no notice of the assignment is given to the trustees; he afterwards proposes to sell the same interest to B; B inquires of the trustees as to the nature of the title and the amount of the interest, and receiving no intimation of any prior encumbrance, completes the purchase and gives the trustees notice. It was held, and I think rightly, that B had a better equity than A.

For myself, I should be satisfied to let the result to which I have come in this cause, rest on the ground on which, thus far, I have put it. But perhaps it is the duty towards the parties of a court whose decisions are subject to the review of a higher tribunal, to state every view that occurs to it which may have an influence on the decision of the cause, one way or the other. This is a case which, in view of the facts as they are claimed to exist on the part of the defence, may be said to be of a very extraordinary character, so much so as to impress the idea that the defence should be examined with care. The view to which I have alluded as being proper to be suggested, respects the answer of the defendants. It appears to me there is an evident halting in it as to several important matters. They say that, on the 26th August, 1836, they released the lot secondly described in their mortgage, to the owners thereof, according to law, from the operation and lien of their mortgage, and that the said release was made with the knowledge, approbation, and consent of A. Peck and of Samuel Condit; that afterwards, on the said 26th August, 1836, Condit made and entered into an agreement in writing, under his hand and seal, to and with the defendants, dated the day and year last aforesaid, whereby he stipulated and agreed, for the considerations therein named and referred to, to and with these defendants, that the said Dodd mortgage should be considered and held as the first lien on the land described in the mortgage to Condit, as by the said agreement, now in the possession of these defendants, will appear; that the said agreement was made and entered into by Condit, with a full knowledge that these defendants had made the said release. In a subsequent part of the answer, they say that the said agreement was

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made and entered into by and between the said Samuel Condit and these defendants, with the full knowledge, consent, and approbation of the said A. Peck, William Peck, and Elijah C. Pierson, at the time of the making thereof.

On looking at the writing called the agreement of Condit, we find it makes no reference whatever to the release given by these defendants. It states the two mortgages, and that he, Condit, has agreed, for certain good causes and considerations, to give priority in payment to the Dodd mortgage, and then declares that, in consideration of the premises and of \$1, to him paid (without saying by whom), he has thereby consented, covenanted, and agreed, to and with the said administrators of Dodd, that the Dodd mortgage shall be considered and held as the prior lien on, &c. This writing is signed by Dodd only. The release executed by these defendants, recites that A. Peck, on the 1st of May, 1830, had executed and delivered to Samuel M. Dodd a bond and mortgage for \$2400 and interest, on certain premises in Orange, one of which is a lot, &c., (describing the second lot mentioned in that mortgage), and then declares that they, for a good and valuable consideration, and of \$1 to them paid, "by John Peck, the present owner of the said lot," release the same from the operation of the said mortgage. The two instruments are separate and distinct from each other, neither having any reference to the other. Now, as to the character of the answer, it is to be remarked, first, that it does not allege that there was any connection between the two writings, or that one was executed in consideration of the other. It is, indeed, inconceivable how a release by the holders of the Dodd mortgage, to John Peck, of a lot covered by that, the subsequent mortgage, which the Condit prior mortgage did not cover, could be a consideration for Condit's giving priority to the subsequent mortgage over his, on the only lot his mortgage covered, the only security he had. There is something in that which ordinary men, dealing upon ordinary principles and motives, cannot understand. But Condit's agreeing and covenanting that the subsequent mortgage should be considered and held as the prior encumbrance on the lot covered by the first mortgage, might be an inducement or consideration for the holders of the subsequent mortgage to release from its

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operation the lot covered by it which was not covered by the first mortgage. But, if that agreement was the consideration of the release, it is extraordinary that it was not stated in the release; and still more extraordinary that it was not so stated in the answer to be sworn to by these defendants.

Again, the answer does not state that these defendants were, or that either of them was present when Condit "made and entered into" the agreement, (to use the language of the answer,) nor that there had been any previous negotiation between Condit and them, or either of them, in reference to the subject matter of the release and agreement, or either of them. If the two were connected, and the release was given by these defendants, in consideration of Condit's writing, called the agreement, the counsel for these defendants would certainly have obtained that information from the defendants; he could not have failed to make the inquiry. And, if he was so informed, it is not conceivable that the astute draftsman of their answer could have put the answer in the shape he has given it.

Again, it is not alleged in the answer, that the writing called Condit's agreement was delivered to these defendants. A slight reading of the answer might make the impression that it was delivered to the defendants. The making the agreement, or writing called an agreement, is spoken of in several different places in the answer; but in each of them there is an absence of the allegation of delivery, a circumstance which we have not a right to overlook. In each of the different places the allegation is, that Condit made and entered into an agreement to and with these defendants. This seems to be going far for the defendants to swear to, if they were not present at the time the writing was made, and it was not delivered to them; for an agreement in its proper legal sense requires the mind and assent of two persons. A reference to the language of the answer and of the writing itself will show on what ground the language of the answer was adopted. The answer says that he, Condit, made and entered into an agreement in writing, under his hand and seal, to and with the defendants. By turning to the writing we find that the answer uses the language and form of expression of the writing. The writing says, Be it known, &c., that I have consented, cov-

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enanted and *agreed to and with* C. and J. Baldwin and J. Dodd, administrators, &c. The answer says, *he*, Condit, made and entered into an *agreement to and with*, &c.; and in this form the defendants swear to the answer. We are not at liberty to say, under these circumstances, that the defendants intended to say, or that the draftsman supposed they would be understood as saying, by the language adopted, either that the defendants were present when the writing was made, or had ever made any negotiation or arrangement for such a writing, or that that writing was delivered to them. Indeed, if they had, and the writing had been delivered to them, it is hardly supposable that they, having executed a release of the other lot, would have been satisfied to let the registry remain as it was. If the writing was delivered to them, and they were satisfied to let the registry remain as it was, they must be considered as relying on the covenant of Condit. But the only thing like an allegation of delivery in the whole answer is the allegation that the writing "is now," that is, at the time of making the answer, in the possession of these defendants.

But I am glad that I have been able to decide the cause very satisfactorily to my own mind, by the application of a just and equitable general principle, and have not been obliged to put the decision of a case so unexampled in some of its features, on the defects in the answer on which I have felt it my duty to make the foregoing comments.

I am of opinion that the complainant's mortgage is entitled to preference.

Decree accordingly.

LEWIS F. R. GREGORY v. RICHARD STILLWELL AND PETER P. BROWN.

1. Bill for specific performance, and injunction thereupon. Extension of time for making payments. Injunction dissolved on answer.

2. As a general rule, an injunction will not be dissolved without the answer of the defendant on whom the *gravamen* of the bill rests. But if the answering defendant is able from his own connection with the subject matter and consequent knowledge, to lay the facts before the court which show that the complainant has no equity, the injunction may be dissolved without the answer of such other defendant.

The bill, exhibited by Lewis F. R. Gregory, June 8th, 1846, states that Ebenezer B. Gregory, by two deeds, one dated September 27th, 1839, and the other dated November 6th, 1839, sold and conveyed to the complainant several tracts of land in the township of Jefferson, county of Morris, and the township of West Milford, county of Passaic; three of which are described in the bill, one situated at New Foundland, in the township of West Milford, county of Passaic, and the other two situated at New Foundland, and each partly in Morris and partly in Passaic county; and that, by virtue of the said conveyances, the complainant entered into and possessed the said lands and premises. That there is on the premises a valuable forge and iron works in full operation. That on the 12th November, 1839, Richard Stillwell recovered a judgment, in the Supreme Court of this state, against the said Ebenezer B. Gregory, for \$350.88 damages and \$33.26 costs, and that thereupon a *fi. fa.* was issued to the sheriff of Passaic, under which the said lands were sold and bought by Stillwell, on the 25th August, 1840, for \$10, and a deed therefor made accordingly, by the sheriff to Stillwell. That Stillwell, by virtue of the said deed, claimed to have title to all the said tracts, as well the part thereof situated in Morris, as the part thereof situated in Passaic. That the complainant, for the purpose of quieting the said claim of Stillwell, and of procuring a complete and proper title for the said premises, proposed to Stillwell to buy of him all his right and title thereto;

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and that it was therefore agreed between Stillwell and the complainant, that Stillwell would sell and convey to the complainant all his right to the said lands, when the complainant should pay him the amount of his said judgment against E. B. Gregory, and the costs and sheriff's fees thereon, and the amount due on a note which Stillwell then held against E. B. Gregory, for \$325, dated December 21st, 1838, with the interest thereon. That Stillwell was about entering into an article of agreement with the complainant accordingly, when Peter P. Brown proposed to Stillwell to make a lease of the premises to the complainant for a certain rent, and to insert therein a clause for the sale and conveyance of the premises to the complainant on the terms aforesaid. That Stillwell, on such suggestion, preferred that form of agreement; and that the complainant being told it was, in effect, the same thing as an ordinary article of agreement for sale, assented to it. That thereupon, an agreement in writing between Stillwell and the complainant was executed, to the tenor and effect following: (setting out the agreement.) It is dated September 2d, 1840, and witnesseth that Stillwell agrees to lease to the complainant for one year, the Carthage forge in Passaic, together with one lot of 10 acres, one lot of $10\frac{1}{2}$ acres and one lot of 6 or 7 acres situated in Passaic and Morris counties, (being the lots described in the bill,) together with all the interest said Stillwell has in said lands and forge in and about said Carthage forge; and that the complainant agrees to pay therefor to Stillwell, \$102.50, the receipt whereof is acknowledged in the agreement; and Stillwell further agrees with the complainant, that he will sell and convey to the complainant all the right, property, claim and demand that he then had or might thereafter have to any lands that were then in the possession of Gregory, the complainant, when said Gregory paid him the amount of his judgment against E. B. Gregory, and a note for \$325 which he held against E. B. Gregory; and Stillwell agrees that the \$102.50 then paid as rent, and \$51 paid by the complainant to the sheriff of Passaic, be counted and allowed as so much paid on the said judgment; and the balance due on the said judgment the complainant agreed to pay in four months from the date of the article; and the said note and the interest thereon he agreed

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to pay in June, 1841. And Gregory agreed, that if default was made in the said payments, he would deliver up to Stillwell the possession of the forge and premises, pond and pondage. And Stillwell further agreed to contest the suit in chancery then commenced by A. Bell, and, if possible, prevent Bell from foreclosing on said forge lots; and if it was necessary for Stillwell to answer Bell's bill, Gregory agreed to be at the expense of the answer. The bill states that the said article is now, as the complainant is informed and believes, in the custody of said P. P. Brown. That at the time of executing the said agreement, he, the complainant, paid to Stillwell the said \$102.40, and to the said sheriff the said \$51. That just before the next payment became due on the said agreement, it was represented to Stillwell, at the request and on the behalf of the complainant, that the complainant could not, without great difficulty, make the said payment by the time it would become due; and that Stillwell replied, as the complainant is informed and believes and charges, that it was of no consequence that the payment should be made when due; that he did not need the money; and that any other time would answer his purpose quite as well; and that the complainant could have his own time for payment, or words to that effect. That the complainant, relying on such extension of time for making the said payment, did not prepare to meet the same when due. That afterwards, on or about June 1st, 1841, and before the last payment became due, Stillwell was applied to, on behalf of the complainant, in relation to the conveyance of the premises to the complainant, pursuant to the said agreement; and that Stillwell then said that the complainant had not complied with the agreement, and that he, Stillwell, would not fulfill it on his part; that he had had trouble enough about it and would have nothing more to do with it, or words to that effect. That it was then, on the behalf of the complainant, represented to Stillwell that the complainant was informed that he, Stillwell, had conveyed, or agreed to convey, his interest in the premises to the said Brown; and that Stillwell, as the complainant is informed and believes, denied it. That Brown, on being inquired of, on behalf of the complainant, also denied that Stillwell had agreed to convey his right in the premises to him,

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Brown. That at the time of the execution of the said agreement, Brown was present and advised Stillwell about it ; and that after the agreement was executed, Brown took the charge and custody of it, and had full notice and knowledge of its contents. That the complainant has since been informed and believes and charges, that Stillwell, on the same day the agreement between him and the complainant was executed, contracted with said Brown to sell him the said premises ; and afterwards, on or about November 1st, 1841, conveyed the same to said Brown, by deed of that date, or some other. That the complainant has since applied and requested him to fulfill the said agreement between the complainant and Stillwell, and to convey the premises to the complainant on the terms mentioned in the said agreement ; and that the complainant was and still is ready and willing, and that he offered to said Brown, to fulfill the agreement on his part, and to pay him the amount due on the said agreement, on his making to the complainant a conveyance of the premises in the same manner as Stillwell had agreed to convey the same ; but that Brown wholly refused so to do, and claims to hold the right and title in and to the said premises. That on the 26th October, 1841, Robert Morrell recovered a judgment in the Circuit Court of Passaic against said P. P. Brown and H. Brown and Henry M. Brown, for \$215.95, damages and costs. That on the 30th October, 1841, the executors of A. Schuyler recovered a judgment in the same court against said P. P. Brown for \$144.73 ; and that there is a suit pending in the said court in favor of Elizabeth Boyd against the said Brown, in which judgment may be rendered, &c. That said judgments are encumbrances on the premises ; and that, by reason thereof, Brown has rendered himself unable to convey to the complainant the said premises in the same manner as Stillwell might and ought to have done. That the complainant, by himself and his tenants, has been in the peaceable possession and enjoyment of the premises and the forge and works thereon since the time of executing the said agreement, and still is in such possession and enjoyment. That Brown, on or about November 20th, 1845, commenced an ejectment in the Circuit Court of Passaic against John B. Vanderen and Elias Sergeant, to recover the possession

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of the said premises, and that the complainant was permitted to appear to the said action, to defend the same, as landlord. That neither Stillwell nor Brown, nor any person for them, ever demanded from the complainant payment of the money, the time for paying which was so extended by Stillwell, or gave any notice of rescinding the said agreement. The complainant charges that Stillwell never intended to fulfill the said agreement, but, on the day of executing it, sold his interest in the premises to Brown; and that Stillwell and Brown both endeavored to conceal their agreement from the complainant till the time of making the said payment had elapsed. That the said agreement between Stillwell and the complainant was meant and intended as an agreement for the sale of the premises, and has been considered and acted upon as such to the present time. That no mention has been made to the complainant by Stillwell or Brown, or any person for them, or either of them, of any rent being due from the complainant for the premises, or of the complainant being merely a tenant of the premises, but that the possession of the complainant has been, under and by virtue of his prior title and of the said agreement, in the character of a purchaser, and that the complainant has, ever since the execution of the said agreement, used the premises as his own, and made great improvements thereon, and done all the repairs to the forge; and not only the small repairs, which it is customary for tenants to make, but also the large repairs, that is to say, such as cost over \$5, which it is customary for the landlord to make, and has expended, in and about the premises, more than \$400; and, among other improvements and repairs, has put in new hot-blast pipes, a new hammer wheel, and a new anvil. The bill prays a specific performance of the said agreement and a conveyance of the premises, on the complainant's paying the residue of the purchase money, with the interest thereon, and an injunction against the further prosecution of the ejectment.

The injunction was granted.

Peter P. Brown put in an answer to the bill. Stillwell did not answer.

The answer of Brown states that he supposes it to be true

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that E. B. Gregory executed and delivered to the complainant the two deeds stated in the bill, and says that the record of the deeds shows that they were both acknowledged November 15th, 1839, and recorded December 5th, 1839. He admits that Stillwell, on the 12th November, 1839, recovered against E. B. Gregory the judgment stated in the bill, and that, on a *fi. fa.* issued thereon, the sheriff sold the premises, so far as they were within the county of Passaic, to Stillwell, and executed and delivered to him a deed thereof; and he says that, at the said sale, the sheriff sold other lands, which were bid off by one Samuel S. Gregory, the father of the complainant, for about \$51, but that he has heard, and supposes it to be true, that the deed for the same was made out by the sheriff to the complainant; that the said judgment of Stillwell was on a note from E. B. Gregory to him, for \$325, and that Stillwell held another note against E. B. Gregory, for the further sum of \$325, both of which notes were secured by a mortgage given by E. B. G. to Stillwell, on the property described in the deeds from E. B. Gregory to the complainant. He insists that, by virtue of the sale to Stillwell, he acquired all the equity of redemption of E. B. Gregory in the lands lying in Passaic, and that, thereby, all the right of the complainant to the lands lying in Passaic was extinguished, as the judgment of Stillwell was prior to the conveyance to the complainant; but he admits that Stillwell claimed a right to the property lying in Morris, by virtue of his said mortgage. He admits that Stillwell, after the said conveyance from the sheriff to him, was applied to by the complainant to purchase the property, but he denies that the complainant made the application for the purpose of quieting any title he had to the property in Passaic, so bought by Stillwell, for, he says, all the title the complainant previously had was extinguished by the sheriff's sale. He says that Stillwell, after his purchase at the sheriff's sale, proposed to him, the defendant, to sell to him the said property for the amount of his (Stillwell's) claim against E. B. Gregory; that he stated to Stillwell that he thought the property was worth the amount, and that he would be willing to buy it at that price, but that he thought Stillwell ought to give the complainant, or some of the Stillwell family, the right to purchase it, and give

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them a chance to pay for it; and that he advised Stillwell to do so, and declined making the purchase on that account; but that he then agreed with Stillwell, that if he, Stillwell, would sell to the complainant, and give him a chance to pay for it, and the complainant should not comply with the terms, that, on the complainant's failure to pay, he, the defendant, would buy the property, and that the defendant and Stillwell entered into an agreement to that effect. That, thereupon, Stillwell and the complainant entered into a verbal agreement. That the plan of leasing the property for a year was proposed by Stillwell's counsel, and he, the defendant, approved it; and it was agreed upon by all parties. That, after this conversation, Stillwell came to him and wished him to go with him to see the complainant and have the agreement concluded. That this defendant did so; and the complainant's father, Samuel S. Gregory, drew up the agreement, and it was then signed by both parties; but it was not under seal; and the agreement was then placed in his hands for safe-keeping, and is yet in his possession. The answer then gives a copy of it. The substance of it is set out in the bill. He insists that, by the agreement, no sale was made, but that it only gave the complainant a privilege of purchasing, if he should determine to do so, by making the payments at the times mentioned; and that, in the meantime, and until he paid, he was to remain as tenant of Stillwell, and that if he did not pay, he would surrender the property. He admits that he has heard, and believes that the complainant paid Stillwell the \$102.50, and says that nothing more has been paid on the said agreement; but he has heard, and believes that the complainant paid \$51 to the sheriff of Passaic for the property bought by S. S. Gregory at the sheriff's sale, and conveyed to the complainant by the sheriff, that being paid for a different property, and which he was bound to pay at the time of making the agreement aforesaid. He says he has never heard that any person had applied to Stillwell for the complainant, or for any other person, or in any way, to obtain a postponement of the time of payment under said agreement, or that Stillwell said it was of no consequence, &c., (in the words of the bill,) and says he does not believe that Stillwell made any such promise, or had any such con-

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versation as is stated in the bill ; and he insists that, if any such promise was made, it being without his knowledge, cannot affect him, he being a *bona fide* purchaser without notice. He says that he has never heard that, on or about June 1st, 1841, or at any other time, Stillwell was applied to on behalf of the complainant, in relation to the conveyance of his right and interest in the premises to the complainant under the said agreement, or of the conversation of Stillwell respecting the same, save by the bill ; or that Stillwell had been applied to to know if he had sold to this defendant ; nor does he recollect that he was asked by the complainant, or any person on his behalf, as to his having bought the property, or of his having agreed to buy it ; but that, after the times of payment had expired, he informed the complainant that he had bought the property, or had agreed to buy it, and that the complainant made no objection to it. He admits that, after the time of payment to be made by the complainant, in case he chose to take the property, had expired, Stillwell informed him that the complainant had not complied with the agreement, and that he, Stillwell, considered the article void, and that this defendant must take the property ; to which the defendant agreed, the defendant considering that the complainant was unable, by reason of his embarrassed circumstances, to take the property ; that he had abandoned the agreement, and that it was at an end ; and this defendant admits he bought the property from Stillwell, and that the same was conveyed to him by deed dated August 12th, 1843, acknowledged and delivered the same day, and recorded September 19th, 1843. He says that, up to the date of the recording of said deed, the complainant had not, so far as this defendant knows or believes, applied to Stillwell for a deed, or tendered any money to him for a deed under said agreement ; nor had the complainant, before that time, applied to this defendant for a deed, or tendered any money to him, or notified this defendant that he claimed any right under the said agreement ; although this defendant had long before informed him that he, this defendant, had bought the right of Stillwell in said property ; and that the complainant never did so till June, 1846, a few days before filing his bill, when the complainant asked this defendant for a deed for the forge property, stating that he

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was ready to fulfill his contract with Stillwell; but that he showed no money to this defendant; and this defendant declined giving him a deed, considering that he had no right to the property. He says, that after the failure of the complainant to pay and after this defendant had agreed to take the property from Stillwell, he applied to his counsel to bring ejectment to recover from the complainant the possession of the lands lying in Passaic, and was advised by his counsel that the complainant was entitled to notice to quit; and thereupon the defendant, as assignee of Stillwell, although before he had received his deed, caused a notice to be served on the complainant, as follows; "You are hereby required to quit the premises held under me, now in your occupation, on the 2d September next, that being the end of a year's occupation, or you will be held to be a trespasser and liable to all the consequences. Dated June 1st, 1843. Signed Peter P. Brown, assignee of Richard Stillwell." That the said notice was directed to the complainant, and served on him June 6th, 1843. He says that at the date of the agreement the complainant lived with his father, S. S. Gregory, within 200 yards of the forge, and continued to live with him, at that place, till the spring of 1844 or 1845. That after the said notice had been served on the complainant, and while the complainant so lived with his father, his father applied to this defendant to purchase of him the said property, and, as an inducement to this defendant to sell, stated to him that the said notice to quit was not, in some respect, legal or in due form, and that this defendant would have difficulty in getting the complainant out of possession. That said S. S. Gregory repeatedly called on this defendant to buy said property, and this defendant finally agreed to sell to said S. S. Gregory all the property conveyed to him by Stillwell for \$1000. That the sum included a private debt of said S. S. Gregory to him, after deducting \$500, which this defendant gave up to said S. S. Gregory; and this defendant also assigned to him certain notes or judgments amounting to between \$500 and \$700, they not being of much value to this defendant, though of some value to said S. S. Gregory. That thereupon this defendant sold and conveyed the said property to the said S. S. Gregory, by deed dated September 1st, 1843; and the defendant

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believes, and then believed, that said S. S. Gregory was acting in this matter with the knowledge and approbation of the complainant; and that, after this sale by this defendant to said S. S. Gregory, the complainant had notice of such purchase, and that he then stated that his father had purchased the forge property, but that he did not believe his father would be able to pay for it. He says that since he gave the said notice to quit, the complainant has never set up any claim to the property, or ever called on him, till June as aforesaid. That S. S. Gregory, after receiving the said deed from this defendant, entered into possession of the premises, and leased the same, or that part thereof being the forge property, to Foster Landing, by lease under seal, dated September 6th, 1843, who held it under said S. S. Gregory and paid rent to him; and that he continued over a year as tenant to said S. S. Gregory. Then said S. S. Gregory worked the forge himself for some time, and in June, 1845, he leased it to John B. Vanderen, who has ever since then been in possession, under the said lease from S. S. Gregory, and has paid the rent to him. That said last-mentioned lease was for one year. That both Landing and Vanderen, by their said leases, agreed to pay S. S. Gregory three hundred of iron for every ton of iron made in said forge, as rent; and that S. S. Gregory has never paid this defendant one cent on said purchase. That S. S. Gregory, on the day he received his deed from this defendant, executed a bond for \$1000 and a mortgage on the same property to this defendant to secure the consideration money, and, he having failed to pay, this defendant foreclosed the said mortgage and obtained a decree for the sale of the property. That an execution was issued under the said decree, and the property sold by virtue thereof, and this defendant bought it and received the deed therefor; and, after receiving the said deed, brought an ejectment against the said Vanderen, the tenant under the said S. S. Gregory, and against E. Sargeant, a workman in possession of the forge, who was employed by said Vanderen. And this defendant denies that the complainant has been in possession of said property all the time since the date of said agreement, but insists that, since the said sale to S. S. Gregory, he, the said S. S. Gregory, has been in possession, by himself or his tenants,

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as before stated. That Vanderen and Sargeant entered into consent rules in the ejectment, and the cause was noticed for trial at the term of March, 1846. That at that term the complainant was admitted to defend the suit as landlord, on condition that he should pay the costs of the term and enter into consent rules in 30 days, or judgment should be entered as of March term. That the complainant's attorney afterwards refused to exchange consent rules; and, at the June term, consented that judgment should be entered, and it was entered, accordingly, against the said Vanderen and Sargeant. He admits the judgments stated in the bill to have been entered against him; but says they have been satisfied. He admits the complainant made some repairs, and put some improvements on the said forge; but what amount he has expended the defendant cannot say; but he says that the said forge works are not now in any better condition than they were at the date of said agreement, taking them altogether.

On this answer, a motion was made to dissolve the injunction.

A. S. Pennington, for the motion.

William Halsted, contra.

THE CHANCELLOR. As a general rule, an injunction will not be dissolved without the answer of the defendant on whom the *gravamen* of the bill rests. But if the answering defendant is able, from his own connection with the subject, and consequent knowledge, to lay facts before the court which show that the complainant has no equity, the injunction may be dissolved without the answer of such other defendant. The equity shown by the bill did not rest on the extension of time for payment alone. The extension alleged would not have been sufficient to authorize an injunction. The only extension of time alleged in the bill related to the first payment. But, at about the time when the second payment became due, the first still remaining unpaid, the complainant, as charged in the bill, applied to Stillwell in relation to the conveyance, and Stillwell then said that the com-

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plainant had not complied with the agreement, and that he, Stillwell, would not fulfill it on his part. Here, then, was an end to the extension of time. This was in June, 1841, and the bill was not filed till June, 1846. But the bill stated that, notwithstanding this answer of Stillwell, the complainant had been permitted to remain in possession four years and upwards, before the ejectment was brought, and that he had expended in improvements upwards of \$400; that Stillwell held the property some time after June, 1841, and then conveyed it to Brown, who had full knowledge of the agreement between Stillwell and the complainant, but that neither Stillwell nor Brown ever asked rent from the complainant, and that the complainant was considered as remaining in possession, not as tenant, under the leasing part of the agreement, but as purchaser, under the other part of the agreement. This brings the equity of the bill within the reach of Brown's answer. Stillwell conveyed to Brown in August, 1843, and Brown swears that on the 1st of September, 1843, he sold and conveyed to S. S. Gregory, the father of the complainant, and with whom the complainant had lived; and that thereupon S. S. Gregory went into possession of the premises and leased the same, or a part thereof, being the forge property, to Foster Landing, by lease dated September 6th, 1843; and that in June, 1845, he leased to Vanderen, who has ever since been in possession under the said S. S. Gregory; and Brown denies that the complainant has been in possession since he, Brown, conveyed, as aforesaid, to S. S. Gregory. Brown further states that, when he sold to S. S. Gregory, he took his bond and mortgage for the purchase money, and that S. S. Gregory made default of payment; and that he, Brown, foreclosed the mortgage, and obtained the decree for the sale of the premises; and that the same was sold accordingly; and that he bought them at the sale; and that his action of ejectment, which was restrained, was founded on the deed he obtained for the premises under the said decree. This is a part of the case which the bill did not give, and which can hardly be supposed to have been unknown to the complainant. As to the repairs and improvements, the bill does not state when they were made. If they were made after the deed from Brown to S. S. Gregory, the making them would go

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to show the probable truth of the statement made by Brown, that the deed from him to S. S. Gregory was made with the approbation of the complainant; and to show that the deed from Brown to the complainant's father was probably for the complainant's benefit. Again, the complainant had the use of the property three years before the conveyance from Brown to S. S. Gregory. How much was done, in the way of repairs and improvements, within that period, and how much after the deed to S. S. Gregory, we are not informed.

Injunction dissolved.

JOHN P. OUTWATER AND OTHERS v. ABRAHAM I. BERRY
AND OTHERS.

1. Sale of real estate by a trustee set aside.
2. Supplemental bill, nature of.
3. Process on the original bill should be served before a supplemental bill is filed.
4. Circumstances under which the want of subpoena on the original bill was held not to be good ground of general demurrer to the supplemental bill.
5. A general demurrer bad in part will be overruled.

On the 26th January, 1844, John P. Outwater and others, stockholders of "The New Barbadoes Toll Bridge Company," for themselves and all other the creditors and stockholders of the said company who should come in and seek relief by and contribute to the expense of the said suit, exhibited their bill, stating the incorporation of the said company by an act passed February 16th, 1816, and setting out the provisions of the act and of the several supplements thereto. That, by virtue of the last supplement, the corporation continued, and the road and bridges of the company continued to be used as a line of public travel, and the company continued to keep up their toll-gate and to col-

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lect the tolls. That the company had not completed their road and bridges on the 18th February, 1843, as required by the last supplement, and that the time for completing the same has not been further extended by any act of the legislature; and that, by reason thereof, the act of incorporation ceased and became of no effect, and the corporation became dissolved on the said 18th February, 1843. That the company, at the time of its dissolution, as aforesaid, were seized and possessed of considerable real and personal estate, and that large sums of money then were and still are due to it, and that the affairs of the company then were and still are in an unsettled state. That, at the time of said dissolution, George Van Riper was, or pretended to be, president of the company, and John A. Berry, Evander Berry and George Bell were, or pretended to be, directors thereof, and Abraham I. Berry was, or pretended to be, treasurer of the company; but how appointed, respectively, except as afterwards stated in the bill, the complainants know not, and have no means of discovering; nor have they been able to discover who the other directors and officers of the company were at the time of the dissolution, if any such there were. That John A. Berry and Abraham I. Berry, both before and at the dissolution, and from thence hitherto, had, or pretended to have, the entire control and management of the affairs of the company; that they began to exercise such entire control in May, 1837; that during the whole of that period they collected all the tolls, averaging from \$1200 to \$2000 a year, without accounting for a dollar, and have proceeded therein as if they were the only parties interested in the company; and that they refuse to come to any account. That when said John and Abraham assumed such control, one D. K. Allen was treasurer of the company, and had in his hands about \$1000 of the money of the company; and that said John, with the consent of said Abraham, took the said money from Allen and appropriated it to their use, and applied it in the purchase of stock of the company. That the said John did not take a transfer of the stock, so purchased, in his own name, but only proxies; that he also transferred stock to the names of others, who paid nothing for it, and did not pretend to own it; and, after such transfer, took their proxies for the same. That this was done to secure

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to himself as large a number of votes as possible. That this whole scheme was devised by the said John and Abraham, with the fraudulent intent of securing to themselves the exclusive control of the affairs of the company; and that it did so. That during the period they had such control, the said John transferred stock to persons who did not pay for, or pretend to own it, solely with the view to elect such persons directors. That said nominal directors were the relations of said John, and that said Evander Berry and George Bell resided and still reside in the State of New York, and took no interest or concern in the affairs of the company. That said John and Abraham, while they had such control, suffered the road and bridges of the company to go to decay, by reason whereof travelers met with accidents and losses. That before the dissolution, a suit was brought in the Supreme Court against the company by C. G. Jabin, for injuries sustained by him while traveling the road, during the time the said John and Abraham had such control and management; in which action a verdict for \$357 was recovered against the company, in January, 1843; on which verdict judgment was entered, March 1st, 1843, after the dissolution of the company, with \$77.84 costs. That a *fi. fa.* was issued on the judgment, returnable to February Term, 1844, which was levied on so much of the road and bridges of the company as are situated in the county of Hudson. And the complainants insist, that such judgment, execution and levy, after the dissolution of the company, were irregular and illegal. That the said John and Abraham have not, nor hath either of them, accounted for the said money so received from Allen, or any part of it. That on the 17th of February, 1843, there was recorded in the clerk's office of Bergen, a deed dated February 15th, 1843, purporting to be made by the company to Abraham I. Berry, stating that the said act would become void on the 18th February, 1843, by reason of the road and bridges not being completed, and that it was doubtful whether the trustees of dissolved corporations, designated by the act entitled "An act for the relief of creditors against corporations," have power, after the dissolution of such corporations, to sell and convey their real estate; and that it was equitable and just that, on the dissolution of the company, their real estate

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should be fairly sold, and the proceeds thereof paid and distributed to the creditors and stockholders, in the manner and order mentioned in said act; and conveying to said Abraham all the lands and real estate of the company and their rights and franchises, in trust, until the dissolution, to permit the company to receive the tolls, and after the dissolution, in trust to sell the same, in such parcels, at such times, and in such manner as may be directed, from time to time, by the persons who may, at the time of the dissolution, own a majority of the stock, and to pay the proceeds to such person or persons as by the act last mentioned are declared to be the trustees of said company when dissolved; to be by them appropriated as the other property of dissolved corporations is in said act directed to be appropriated by such trustees; he, the said Abraham, first retaining the expenses of the sales and of executing the trust; which deed was signed by George Van Riper, the seal of the county being affixed, the acknowledgment stating that he had signed and sealed it by the order of the directors.

The bill denies this, and charges that the said deed was fraudulent, and was made for the purpose of enabling the said John and Abraham to have, notwithstanding the dissolution of the company, the entire control and enjoyment of the property of the company. That the said John and Abraham, since the dissolution, have kept, and still keep up a toll gate, and collect tolls, and apply the money to their own use. That they refuse to account, or show the books of the company. That since the 1st of January, instant, (January, 1844,) advertisements have been posted up in two or three places in the county of Bergen, that the said Abraham, as trustee of the company, will sell at public auction, on the 5th of March, 1844, at, &c., all the right and title to the road, real estate, bridges, and fixtures of the company. The bill prays an account; and that the complainants may be paid what is due to them; and that the said deed may be declared to be fraudulent and void; and that a receiver may be appointed, &c.; and that the defendants may be enjoined from receiving any of the debts, and from conveying or encumbering any of the property of the company, and from collecting any tolls, and from exercising any of the franchises granted by the said acts of the legislature.

On this bill, an order was made, dated January 26th, 1844, that the defendants show cause, on the 10th February, 1844, why an injunction should not issue and receivers be appointed; and that notice of the hearing be given by service of a copy of the order on such of the defendants as reside in this state.

The application for an injunction and receivers was resisted, and on the hearing, the affidavits of John A. Berry and Abraham Berry were read in opposition; and the Chancellor, on the 12th April, 1844, made an order refusing the application, and directing the complainants to pay to the defendants, John A. Berry and Abraham I. Berry, their costs in opposing said application.

After the filing of this bill, the sale of the road and bridges, as advertised as aforesaid, was adjourned to April 25th, 1844; and on that day, the said Abraham, acting as trustee under the said deed, struck off and sold the same to the said John A. Berry for \$910.

On the 30th August, 1845, a supplemental bill, or bill so called, was filed, stating the contents of the original bill and the proceedings thereon; and stating that, since the filing of the original bill, the sale, as advertised in the manner stated in that bill, was adjourned to April 25th, 1844, and that on that day the said Abraham exposed the said road and bridges for sale, at public auction, under the following conditions of sale, giving a copy of the conditions of the sale.

The 3d condition was, "Ten per cent. of the purchase money to be paid in cash at the close of the sale, and the residue upon the delivery of the deed."

The 4th was, the deed to be delivered in 30 days, and would be a deed of bargain and sale, with covenants against the acts of the grantor.

The 5th was, that any purchaser neglecting to pay at that time, should forfeit what he had before paid and his right to the purchase, and be liable to make good any loss on a re-sale.

That few persons attended on the day of sale. That two individuals, whose names are not known to complainants, were evidently hired by the said John and Abraham, or one of them, to attend, and were paid for their attendance by their direction, or

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that of one of them, as the complainants are informed by the toll-gatherer, and believes, out of the funds of the company. That when the property was put up for sale, and the conditions read, the said Abraham having refused to permit the said Peter to see the conditions before, the said Peter told the said Abraham that he came there intending to bid, but was not prepared to pay ten per cent. in cash down, and requested an adjournment for a fortnight, which was refused. That the complainant, John P. Outwater, then asked said Abraham if he would take the joint note of him and Peter Outwater for the ten per cent., payable in two weeks; and the said Abraham refused. That said Peter then offered to bid for said road and bridges \$6000, and give such joint note for the ten per cent., payable in two weeks, and to comply in all other respects with the terms of the sale; and that this also was refused by the said Abraham. That said Abraham then put up the property for sale, and struck it off to the said John A. Berry, his father, for \$910.

The bill charges that the sale was a mere form, and fraudulent, being designed to carry the appearance of fairness without intending that any other person than the said John, or some person acting in concert with said John and Abraham, should become the purchaser. That the note of P. Outwater and John P. Outwater for the ten per cent., or the entire \$6000, or a much larger sum, was good, and so known to be by said Abraham and John. That John A. Berry, as the complainants are informed and believe, did not pay the ten per cent. on his purchase at the time of the sale. That the complainants, or one of them, as late as six months after the sale, was informed by the said Abraham that the said John had paid nothing on the said pretended purchase.

The bill charges that Abraham has made a deed to John for the property, but that the deed has not been recorded, to their knowledge. That after said property was so struck off to the said John, the said Peter Outwater offered to give \$6000 for it, but the offer was refused by the said John.

This bill prays that the defendants therein named, being the same defendants named in the original bill, may answer not only the supplemental, but the original bill also; and that the

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said deed made by Abraham to John A. Berry be set aside as fraudulent and void, and made for an inadequate price; and that John A. Berry may be restrained from conveying and encumbering the property; and that the deed made by the president and directors of the company to the said Abraham I. Berry, in trust, may be given up and canceled, as fraudulent and void; and that the affairs of the company may be settled up, under the provision of the acts of the legislature, by the president and directors or managers of the corporation at the time of its dissolution, as trustees for said corporation, under the direction of a master, or by a master, under the directions of the court, and the property sold and the debts collected, and divided fairly among the stockholders, after paying the debts of the company, if there are any, and the costs and expenses.

The bill prays an injunction and a subpoena against the said defendants.

The subpoena issued on the filing of this bill was returned served on George Van Riper, John A. Berry and Abraham I. Berry; the other defendants being returned not found.

To this bill Abraham I. Berry and John A. Berry have filed separate general demurrers.

P. D. Vroom, in support of the demurrers.

William Pennington, *contra*.

THE CHANCELLOR. Several grounds were taken in support of the demurrer. One was, that there was no guarantee that the second sale should yield as much as the first; that the complainants made no offer to secure the amount brought at the sale which has been made. On the facts stated in the bill, and which the demurrer admits, no such offer or guarantee can be necessary. The bill states that a bid of \$6000 was offered, and an unquestionable note, payable in two weeks from the day of sale, for the ten per cent. on that sum, the residue to be paid according to the conditions of sale. That this was refused, and the property was struck off by Abraham I. Berry, acting as trustee for the company, to his father, John A. Berry, for \$910. The

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bill states that the ten per cent. was not required from the said John, and that he has never paid it, nor any part of the purchase money. The application to set aside such a sale is very different from the ordinary application to open biddings. There was nothing urging the trustee, or justifying him in selling at such a sacrifice in the face of such an offer. I am of opinion there is nothing in the objection.

Another ground taken in support of the demurrer was, that the second bill goes on principles opposite and hostile to the case made by the original bill, and does not accord with the original bill. The first bill seeks to set aside the deed made by the president and directors of the company to Abraham I. Berry as trustee for the company, with power to sell for the benefit of the company; and the second bill seeks to set aside the sale made by the trustee, after the filing of the original bill, on the ground that such sale was improperly and fraudulently made. I can perceive no hostility between the prayers of the two bills.

The second bill prays, also, that the trust deed to Abraham be set aside. This, it was argued, was incongruous. It does not so strike me. The trust deed to Abraham, and the sale made by him, may both be set aside; or the trust deed held good and the sale by the trustee under it be held void. The bills, taken together and considering one as supplemental to the other, seek, the first, to set aside the trust deed, and the second, to set aside the deed made by the trustee. Both may prevail, or the second may prevail though the first should not. I do not see that the mere introduction of a prayer in the second bill that the trust deed be set aside produces any fatal incongruity.

The other ground taken in support of the demurrer was, that no subpoena was ever served or issued on the original bill; that the complainants were therefore out of court, and not in condition to come in by supplemental bill. It is true that subpoenas in the original suit should be served before a supplemental bill be filed. *Müf. Pl. 62, margin, note E.*

If the second bill in this case is to be considered as strictly a supplemental bill, the questions to be decided would be, first, whether the want of subpoena in the original suit can be taken advantage of by general demurrer to the supplemental bill; and,

second, whether the course taken by the defendants under the original bill and the proceedings had thereon were not equivalent to an appearance by the said John and Abraham to the original bill, or sufficient to prevent these defendants from taking advantage of the want of subpœna in the original bill, by general demurrer to the supplemental bill. On the filing of the original bill, an application was made for an injunction. The Chancellor appointed a day for the hearing of the application, and directed notice to be given to these defendants. At the hearing they resisted the application, and put in their several affidavits in opposition to it. The Chancellor denied the application, with costs; and the defendants took an order that the complainants pay to them, John A. Berry and Abraham I. Berry, their costs in opposing said application, to be taxed; and in the taxed costs they were allowed for a copy of the bill.

The second bill states the contents of the first bill, and the proceedings under it on the application for an injunction, and adds the new matter of the sale by Abraham, and prays that the defendants may answer both bills. The defendants John and Abraham demur generally to the second bill. No case was cited, nor have I been able to find any, in which, under such circumstances, a demurrer was allowed for want of a subpœna on the original bill. In this case no useful purpose would be served by allowing the demurrer on this ground; and I am strongly inclined against it. I find a note of the case of *Ogden v. Gibbons*, in which it is said that Chancellor Williamson inclined to the opinion that a general demurrer was to be considered as a waiver of all defects in the service of a subpœna. It seems to me that, in all propriety, the objection should have been made early, and in another way; and that it should not be allowed to prevail when, after the lapse of several terms, the cause is brought to a hearing on a general demurrer.

But there is another view of the case on which, as it appears to me, the demurrer must be overruled. The first bill was filed to set aside the trust deed made to Abraham. After that bill was filed, Abraham, as trustee, conveyed the property to John A.; and the second bill seeks to set aside this conveyance from Abraham to John A. It is only in one respect that the second

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bill can be considered as supplemental. If, in order to set aside the deed from Abraham to John, it be essential that the trust deed to Abraham be set aside, then the second bill may be considered as supplemental. In pursuing the first bill, to set aside the trust deed to Abraham, his conveyance to John A., after the filing of the first bill, occasioned an imperfection in the proceedings which it was proper to remedy by a supplemental bill. But if the trust deed to Abraham is good, there is nothing in the second bill of the character of a supplemental bill. In that case, it would be a sufficient bill for the purpose of setting aside the deed from Abraham to John. If the original bill was dismissed because no subpoena was issued on it, would this second bill fall altogether? Would the effect be anything more than that that part of it which asks that the trust deed to Abraham be set aside would fall, and be left for another suit? So far as the second bill goes for the setting aside of the deed from Abraham to John, it is a new case, not necessarily connected with the first bill; for, though the trust deed should be held good, the deed from Abraham to John might be set aside. The new matter of the second bill, that is to say, the deed from Abraham to John, may be tried and decreed upon, and the matter of the first bill, that is, the trust deed to Abraham, be left entirely untouched and remain the subject of a distinct suit. If no decree could be made on the new matter stated in the second bill without decreeing that the trust deed to Abraham was void, then, unless the defendants were properly brought in under the first bill, the suit could not proceed. But the deed from Abraham to John may be void and the trust deed to Abraham may be good. At most, then, this second bill could only be demurrable so far as it relates to the matter of the first bill. But the demurrer is general to the whole bill, and being, as it seems to me, bad in part, it is bad in whole, and must be overruled.

Demurrer overruled.

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JACOB CUMMINS v. GEORGE WIRE.

1. A bond and mortgage declared usurious under the pleadings and proofs.
2. The payment and receipt of usurious interest is *prima facie* evidence of a prior usurious contract.
3. It was agreed that C. should lend W. \$2000, on interest, and that W., for the loan, should give C., before receiving all the money, a wagon, of the value of \$100, over and above the legal interest; and that to secure the repayment of the \$2000, with legal interest, W. should give C. a bond and mortgage. *Held*, usurious.
4. A purchaser of lands at sheriff's sale on judgment and execution at law, subject to all prior legal encumbrances, can take advantage of usury in a mortgage of prior date to the judgment. *Semble*, that a subsequent judgment creditor can take advantage of usury in a prior mortgage.
5. A mortgagor, a defendant in a foreclosure suit, the mortgaged premises having been sold by the sheriff under judgments and executions at law against him, is a good witness, in the foreclosure suit, for a judgment creditor or such purchaser at sheriff's sale, defendants in the foreclosure suit, to show usury in the mortgage.
6. A paper purporting to be a certified copy of an order and of the signature of the Chancellor thereto, for the examination of the defendant in a suit, was sent by the clerk to the solicitor of the defendants, but, by some oversight, the original draft of the order had not been presented to the Chancellor for his signature. *Held*, that the court might receive the testimony if the party examined was not interested.

On the 12th April, 1844, Jacob Cummins exhibited his bill for the foreclosure of a mortgage, dated April 1st, 1841, executed by George Wire and his wife to him, to secure the payment of a bond of the same date, executed by Wire to him, and conditioned for the payment of \$2000 on or before April 1st, 1843, with interest from the date thereof. The mortgage was recorded on the 8th April, 1841. The bill then states several judgments against Wire, and among them a judgment of Marsh and Willis and a judgment of Magie and Sanderson, and states that, on or about February 1st, 1844, Wire and wife executed a mortgage on the same premises to Amos D. Kennedy, to secure the sum of \$3822.03. The judgment creditors and subsequent mortgagee are made parties defendants, with Wire and wife.

To this bill the defendants Marsh and Willis, on the 7th December, 1844, filed an answer, setting forth that, since the ex-

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hibiting of the bill, they, in connection with Magie and Sanderson, two other of the defendants, have become the purchasers of the mortgaged premises, at a public sale thereof by the sheriff of Warren, on the 28th May, 1844, by virtue of certain executions issued out of the Common Pleas and Circuit Courts of Warren against Wire. That the conveyance was made by the sheriff to Magie and Sanderson, and is held by them for the joint benefit of themselves and these defendants. They admit the execution and delivery of the bond and mortgage, and say they have been informed and believe that, before the making of the mortgage, and about in March, 1841, Wire, being somewhat embarrassed in his affairs, applied to the complainant to lend him \$2000; and that it was then corruptly agreed, contrary to the statutes in such case made and provided, by and between the complainant and Wire, that the complainant should lend Wire \$2000, and should forbear and give day of payment till April 1st, 1843, and that Wire, for the loan of the said \$2000, and the giving day of payment thereof as aforesaid, should give and pay the complainant, before receiving the whole of the \$2000 from the complainant, a wagon or carriage to be of the value of at least \$100; also, that Wire should pay the complainant interest on the said sum so agreed to be loaned, at the rate of six per cent. per annum, from the said 1st of April, 1841, until the time of payment thereof as aforesaid; that for securing to the complainant the repayment of the said \$2000, with interest, Wire should execute his bond, conditioned for the payment of the \$2000, by him to the complainant, with interest, on the 1st of April, 1843, which bond was to be secured by a mortgage on the real estate of Wire, or some part thereof, to be executed by Wire and his wife to the complainant. That in pursuance of the said corrupt agreement, the complainant lent Wire various sums, at different times, in all amounting to \$2000; but that before the whole \$2000 was lent and advanced to Wire by the complainant, Wire, in pursuance of the said corrupt agreement, paid to the complainant, and the complainant received from him, a wagon or carriage of the value of at least \$100, for the loan of the said sum of \$2000. That they have been informed and believe that, for securing the repayment of the said \$2000 on

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the 1st of April, 1843, with interest, Wire, in further pursuance of the said corrupt agreement, on or about April 1st, 1841, executed his bond in the penal sum of \$4000, conditioned for the payment of \$2000 on the 1st of April, 1843, with the interest thereon; and that, as a further security for the said payment, Wire and his wife executed and delivered to the complainant a mortgage, bearing even date with the said bond; and they charge that the bond and mortgage so as aforesaid executed and delivered to the complainant by the said Wire for the purpose aforesaid, are the same bond and mortgage set forth in the complainant's bill. That the value of the said wagon so agreed to be given and paid, and which they charge was given and paid by Wire to the complainant, for the said corrupt and unlawful purpose, and the interest of the said \$2000, so reserved and made payable to the complainant by the condition of the said bond, and secured by the said mortgage, exceeds the rate of \$6 for the forbearing of \$100 for one year, contrary, &c., by means, &c., they say, the said mortgage was and is wholly void.

Magie and Sanderson have also put in an answer, in which they state the purchase of the premises since the exhibiting of the bill, at sheriff's sale, as stated in the answer of Marsh and Willis; and admit the execution of the bond and mortgage to the complainant. They state, that before the making of the mortgage, and about in March, 1841, Wire applied to complainant to lend him \$2000; and that it was then corruptly agreed by and between the complainant and Wire, contrary, &c., that the complainant should lend Wire \$1900, and should give day, &c., till April 1st, 1843, and that Wire, for the loan of said \$1900, and for giving day of payment as aforesaid, should pay the complainant \$100; also that Wire should pay the complainant interest on the said \$1900 at the rate of six per cent. per annum, and should also pay interest at the same rate on the said \$100 so agreed to be given and paid by Wire to the complainant, from April 1st, 1841, till the time of payment thereof. That in order to secure to the complainant the repayment of the \$1900 and the payment of the \$100, so agreed to be paid by Wire to the complainant, with the interest thereon, it was further agreed that Wire should give to the complainant a bond, in the penal

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sum of \$4000, conditioned for the payment of \$2000, with interest thereon, on the 1st of April, 1843, which bond was to be secured by a mortgage, &c. That in pursuance of said corrupt agreement, the complainant lent Wire various sums, at different times, amounting in all to \$1900; that to secure the repayment thereof on the 1st of April, 1843, with the interest thereon, and also to secure the payment of the said \$100, to be paid by Wire to the complainant for and in consideration of the said loan, with the interest thereon, on the said 1st of April, 1843, Wire, in further pursuance of the said corrupt agreement, on or about April 1st, 1841, made and delivered to the complainant his bond, in the penal sum of \$4000, conditioned for the payment of \$2000, with the interest thereon, on or before April, 1843; and that further to secure, &c., Wire and wife executed and delivered to the complainant a mortgage bearing even date with the bond; and that the bond and mortgage so made are the bond and mortgage set forth in the bill. That the \$100 so agreed to be paid by Wire to the complainant, and the payment of which, with the interest thereon, was so secured, with the interest on the \$1900, so loaned, and which was also secured by the said bond and mortgage, exceeds the rate of \$6, &c.; by reason whereof, &c., the said mortgage was and is void. There is exhibited on the part of the complainant a receipt dated April 2d, 1841, signed by George Wire, acknowledging the receipt from Cummins of..... \$1081 48
 and Christian Schmuck's note for 33 22
 and George Mitchell's note for 60 00
 and Samuel Bell's note for 5 30
 and Cummins' own note for 820 00
 in all \$2000, in full compensation for a mortgage made to him, Cummins, by Wire, for \$2000, made the first day of April, 1841.

The complainant, instead of the usual replications to the answers, put in special replications, under oath—a novel and irregular proceeding—in one of which replications he says he admits he did lend Wire, at different times before and at the time of executing the bond and mortgage, various sums of money, and in notes and obligations against good and solvent men, in all

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amounting to \$2000, and not to the sum of \$1900 only, as is charged in the answer of Magie and Sanderson; but denies that before the whole sum of \$2000 was lent as aforesaid, Wire paid him, and he received from Wire \$100, or any other sum of money, nor agreed to receive any sum of money, nor the said Wire agree to pay any sum of money, for the forbearance of payment, nor for the loan of the said \$2000. And he denies ever receiving from Wire, on the said bond and mortgage, for the said \$2000, so loaned, any sum of \$100, or one cent more than the interest of six per cent. per annum; nor did ever bargain or agree to receive anything more than at the rate of six per cent. for the said \$2000 so loaned as aforesaid; and he admits that Wire did offer him a carriage, after he had so loaned him the said \$2000 as aforesaid, but which he absolutely refused to receive, and never did receive, nor any other property whatever.

In his replication to the other answer, he says he admits he did lend to Wire, at different times, before and at the time of executing the bond and mortgage, various sums of money, and in notes and obligations against good and solvent men, in all amounting to \$2000; but he denies that before the whole sum of \$2000 was lent and advanced, Wire paid to him and he received from Wire a wagon or carriage of the value of \$100, for the loan of the said \$2000 as aforesaid, or any wagon or carriage of any value whatever for the loan of any sum whatever. He denies ever receiving from Wire, on the said bond and mortgage for the said \$2000 so loaned by him as aforesaid to the said Wire, any carriage, wagon, or any other property whatever, or one cent more than the interest at the rate of six per cent. per annum; nor did he ever bargain or agree to receive anything more than at the rate of six per cent. per annum for the said sum of \$2000, so loaned as aforesaid. He admits that Wire offered him a carriage after that he had so loaned him the said \$2000 as aforesaid, but which he absolutely refused to receive and never did receive.

Testimony was taken on both sides.

Theodore Little opened the argument on the part of the defendants. He cited 2 *Cowen* 412; 3 *Harrison* 325; 8 *Cowen*

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669; *Greenl. Ev.* 542; 2 *Hill's Rep.* 522; 8 *Paige* 639; 16 *Mass. Rep.* 118; 14 *John. Rep.* 435; 6 *Gill. & John.* 18; 3 *Edw. Ch. Rep.* 614, 638; 12 *Mass. Rep.* 32; *Halst. Dig.* 234; 1 *Green's Ch.* 104, 405; 4 *Pet. Rep.* 205, 228.

William Halsted, for complainant. He cited 1 *Paige Ch. Rep.* 429; 12 *Gill. & John.* 379; 10 *Ib.* 44; 9 *Ib.* 83; 1 *Hoff. Ch. Pr.* 485; *Gresl. Eq. Ev.* 161, 242, 3; 3 *Atk.* 401; 2 *Br. Ch.* 330; 3 *John. Ch. Rep.* 612; 18 *Ves.* 517; *Ambler* 592; 3 *Ves.* 220, 4; 2 *Ves. & Beam* 401 and note; 20 *John. Rep.* 142; 14 *East* 56, 565; 3 *Wheat.* 193, note; 5 *Paige* 638; 1 *Smith's Ch. Prac.* 344; 3 *Paige* 240; 8 *John. Rep.* 84; 4 *Day* 37, 114; *Gould's Plead.* 90, 91, see 66; 4 *Paige* 526; 3 *Wend.* 573; 10 *Wheat.* 392; 1 *Campbl. Rep.* 165; 5 *Coke* 120; 1 *Gallison's Rep.* 425; 7 *Conn. Rep.* 413; 7 *Halst.* 79.

Asa Whitehead, in reply.

THE CHANCELLOR. I will first inquire whether the usury, in the manner and form in which it is set up in either of the answers, is sustained without the testimony of Wire. The answer of Marsh and Willis charges the usury thus: that before the making of the mortgage, and about in March, 1841, Wire applied to the complainant to lend him \$2000, and that it was then corruptly agreed, by and between the complainant and Wire, that the complainant should lend Wire \$2000, and should give day for payment till April, 1843; and that Wire, for the loan of the said \$2000 and the giving day as aforesaid, should give and pay the complainant, before receiving the whole of the \$2000, a wagon of the value of \$100; also, that Wire should pay the complainant interest on the said sum so agreed to be loaned, at six per cent., from the said 1st of April, 1841, until the time of payment thereof as aforesaid; and that, to secure the repayment of the \$2000, with interest, Wire should give his bond for, &c., and secure it by his mortgage, &c.; and that, in pursuance of the said corrupt agreement, the complainant lent Wire various sums, at different times, in all amounting to \$2000; and that, before the whole \$2000 was lent and advanced, Wire, in pursuance of the said corrupt agreement, paid to the complain-

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ant, and the complainant received from him, a wagon of the value of \$100 for the loan of the said sum of \$2000 ; and that, for securing the repayment of the said sum on the 1st of April, 1843, with interest, Wire, in further pursuance of the said corrupt agreement, on the 1st of April, 1841, gave his bond and mortgage, &c. ; which are the same bond and mortgage set forth in the complainant's bill. The charge is shortly this, that it was corruptly agreed that Cummins should lend Wire \$2000 on interest, and that Wire, for the loan, should give Cummins, before receiving all the money, a wagon of the value of \$100, over and above the legal interest ; and that, to secure the repayment of the \$2000, with legal interest, Wire should give his bond and mortgage ; that in pursuance of the agreement, Cummins lent the \$2000, in various sums, at different times, and that, before the whole was advanced, Wire gave, and the complainant received the wagon ; and that, to secure the repayment of the \$2000, with interest, Wire gave his bond and mortgage.

That a wagon, of the value of \$100, was delivered by Wire at Cummins' residence, is proved by several witnesses.

James Frashe says that Cummins and Wire came to Wire's carriage shop, not far from the 1st of April, 1841, and looked at the bodies and the gearing. That after Cummins left, Wire showed him a body and gearing to be finished for Cummins. That it was finished that spring, and that he, the witness, by Wire's direction, delivered it to Cummins, at his residence. That it was delivered about six weeks after Cummins was at the carriage shop, as before stated.

Simeon A. Cummins, a son of the complainant, sworn on the part of the complainant, proves the delivery of the wagon, and that it was delivered by Frashe. He thinks it was delivered the last of July or 1st of August.

An effort has been made on the part of the complainant, to show that the wagon was not received by *him*. I forbear making any particular remarks as to this effort ; it is, perhaps, sufficient for me to say that it should not receive the favor of the court. It must be taken as a fact in the cause that the wagon was received by the complainant.

On what account was it delivered by Wire and received by the

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complainant? The complainant, in a special replication put in by him, under oath, a novel proceeding at this day, admits that Wire did offer him a carriage, after he had so loaned him the said \$2000, as aforesaid, but which, he says, he absolutely refused to receive, and never did receive. Having reached the conclusion that this wagon was received by Cummins, this sentence is sufficient to show that it was received in consideration of this loan.

What was the amount of the loan? The evidence, exclusive of Wire's testimony, shows that the amount of the loan was \$2000. We have, then, a loan of \$2000, secured by the bond and mortgage, to be paid with interest, and the delivery by Wire and the reception by Cummins of a wagon, of the value of \$100, in consideration of the loan.

When was the wagon delivered, in reference to the time when the money was advanced? The answer says it was delivered before all the \$2000 was advanced. The special replication admits that Wire did offer him a carriage after he had so loaned him the said \$2000, as aforesaid. These words "so" and "aforesaid," refer to the statement of the loan previously made in the said replication. The statement is thus: he admits he did lend Wire, at different times, before and at the time of the execution of the bond and mortgage, various sums of money, and in notes and obligations against good and solvent men, in all, amounting to \$2000. Wire's receipt of April 2d, 1841, exhibited by the complainant, shows that Wire received from Cummins:

Cash.....	\$1081 48
Christian Smuck's note for.....	33 22
George Mitchell's note for.....	60 00
Samuel Bell's note for.....	5 30
and Cummins' own note for.....	820 00

We have no testimony as to the precise time when this note of Cummins for \$820 was paid.

Jacob A. Hays, a witness sworn for the complainant, says he had the large note, (that is, Cummins' note to Wire,) in his possession; he thinks it was for about \$800. Wire sent him to collect money, and gave him this note against Cummins, among others; that he called on Cummins, and that, in a day or two,

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Cummins came up to Warrenville, and saw Wire ; and he thinks they then talked about this note. He says that, as far as he recollects, this was before the wagon was got and before this note was paid.

This is all we have in testimony as to whether the wagon was delivered before this note was paid. But when the complainant, in order to meet another view of the case, and to show that the whole amount of the \$2000 was lent on the 1st of April, 1841, is driven to produce a receipt of Wire which shows that he, Cummins, gave Wire his note for \$820 of it, and does not show when this note was payable, or when the \$820 was paid ; and when it is shown that Wire sent a man with this note to Cummins to get the money for it, and that he did not pay it to the messenger, but in a day or two afterwards went up to see Wire ; that shortly after the 1st of April a body and gearing were directed to be finished for Cummins, and that it was delivered, as some of the testimony shows, within six weeks thereafter, other testimony putting it a month or two later ; I think it would be asking too much to ask the court to permit these securities to stand because there is a want of precise proof that the wagon was delivered before all the money was advanced. If it was not, there would be very little of substance in the variance ; for, whether the wagon was delivered a few days before or a few days after the whole money was advanced, is substantially of no importance. And though courts have been astute in defeating the defence of usury—I think quite enough so—yet I believe no case can be found in which a complainant, who, by his own proof, shows that he did not advance all the money when the securities were taken, but gave his own note for four-tenths of it, and does not show when that note was payable, nor when paid, and who is shown by testimony to have received a wagon, of the value of \$100, in consideration of the loan, beyond the interest, and within some short time after the date of the securities, has been permitted to sustain them on the ground that the proof is not precise that he received the wagon before he paid all the money. If he felt driven to this ground, he had it in his power to give proof in opposition to the facts and circumstances proved affording a

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fair presumption that the money was not all paid till after the wagon was delivered.

The testimony of Dennis and of Barton and Drake cannot be overlooked, in considering whether the defence made by this answer is made out. Dennis says the complainant told him he had let Wire have the money, and that he understood the complainant to say he got something for it, he can't say whether \$100 or \$200.

Barton swears that, in May or June, 1841, Cummins called at his house and asked to see the law in regard to usury, and said he had loaned Wire some money, and that people said he had taken usury, and that Wire would swear him out of it; that he, Barton, read to Cummins the section concerning usury, and that Cummins then said, "If Wire saw fit to make him a present, what business was it to anybody," or words to that effect.

Jacob Drake, sworn for the complainant, on his cross-examination, after an evasive answer or two, says he thinks the complainant told him that Wire had given or offered him something like \$100, for the sake of getting some money, but that he would not ask it of him the way things turned out.

There is but one other question remaining to be considered for the purpose of determining whether the defence set up by this answer is made out, excluding the testimony of Wire. The answer charges a previous corrupt agreement to give and receive the wagon. That the loan agreed for was \$2000; that a wagon, of the value of \$100 was given by Wire and received by Cummins, in consideration of the loan, I cannot doubt. That the wagon was delivered before all the money was advanced, (if it be at all necessary that such prior delivery should be proved,) must, I think, under the evidence in the cause, be considered as proved. Was the wagon delivered and received on a corrupt agreement made between the parties at the time of or previous to the loan? On this part of the case, I think the doctrine sanctioned by our Supreme Court, in 2 Har. 497, and 3 Har. 325, that the payment and receipt of usurious interest is *prima facie* evidence of a prior usurious contract, is the true doctrine. If this be not so, the statute against usury might as well be struck from the statute book. If courts are to permit themselves to be

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blinded by a pretence that what was given, for a loan, beyond legal interest, was a present made by the borrower to the lender, after the money was lent, without any agreement or stipulation therefor before, the law against usury is little better than a dead letter.

I am of opinion that the usury as set up in the answer of Marsh and Willis is proved, excluding the testimony of Wire.

Assuming, for the present, that Wire's testimony is admissible, we will next examine whether the usury, in the manner and form in which it is set out in the answer of Magie and Sanderson, is proved. This answer states that before the making of the mortgage, and about in March, 1841, Wire applied to Cummins for the loan of \$2000, and that it was then corruptly agreed between them that Cummins should lend Wire \$1900 and give day, &c., till April 1st, 1843; and that Wire, for the loan of said \$1900 and the giving day as aforesaid, should pay Cummins interest on the \$1900 and on the \$100, at 6 per cent., from April 1st, 1841, till the time of payment thereof; and that, to secure the \$1900 and the \$100, with the interest thereon, Wire should give the bond and mortgage. That, in pursuance of the said corrupt agreement, Cummins lent Wire various sums, at different times, amounting in all to \$1900; that to secure the repayment thereof and interest thereon, on the 1st April, 1843, and the payment of the \$100 to be paid by Wire to Cummins, in consideration of the said loan, with the interest thereon, on the same 1st April, 1843, Wire, in further pursuance of the said corrupt agreement, on or about April 1st, 1841, gave his bond and mortgage, &c.

The answer is, substantially, shortly this: that Wire agreed to borrow and Cummins agreed to lend \$1900, and that, for the loan, Wire agreed to give, and Cummins agreed to receive Wire's bond and mortgage for \$2000, with interest thereon; and that the loan was made and the securities given according to the agreement.

Wire testifies that when he first applied for the money, he proposed to Cummins if he would raise him \$1900, by or about the 1st April, he, Wire, would give Cummins his bond and mortgage for \$2000; that the sum agreed upon was \$1900; and

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Cummins said he would try and raise the money ; and that Cummins did raise for him, in money, together with Cummins' note, \$1900, on or about April 1st, 1841 ; and for which he, Wire, gave his bond and mortgage, the mortgage being executed by his wife also, for \$2000, with interest thereon. That he received but \$1900.

There can be no doubt that this proof sustains the defence set up in the answer of Magie and Sanderson ; and this proof is entirely consistent with, and is corroborated by the other evidence in the cause, aside from that which relates to the wagon ; and the whole testimony of Wire, including his statement of the transaction in relation to the wagon, is entirely consistent with all the other testimony in the cause, in reference to the usury. And here I may be permitted to advert again to the complainant's special replication. I think it is well calculated to show how very hard is the way of the transgressor ; and to impress upon us the truth that if shallow devices are to be permitted to succeed in overcoming the defence of usury, great elasticity of conscience, and great injury to the cause of morals will be the result. In the first part of the replication he resorts to a literal denial, (an improper mode of answering,) or rather an attempt at a literal denial ; for he fails even in this before he gets through. He denies that before making of the bond and mortgage, and about in March, 1841, Wire applied to him for the loan of \$2000, or some other sum, and that it was then corruptly agreed between them that he should lend and advance Wire \$1900, and that he should give day, &c., to Wire, till April 1st, 1843, and that Wire, for the loan of the said \$1900 and the giving day as aforesaid, should give and pay to him \$100 ; also that Wire should pay him interest on the said \$1900 at six per cent., and should also pay interest at the same rate on the said sum of \$100 so agreed to be given and paid by Wire to him, from the 1st of April, 1841, until the time of the payment thereof ; that in order to secure to him the repayment of the said \$1900 agreed to be paid as aforesaid, to him by Wire, with the interest thereon, it was further agreed that Wire should make and deliver to him the bond of Wire for \$2000, and the mortgage, &c. Now, this denial is all in one connected clause, the different parts of which

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are connected by copulatives ; and if his denial is true as to any one part, it is true as to the whole.

This answer charges a part of the agreement to have been that, in order to secure to Cummins the repayment of the \$1900 and the payment of the \$100, Wire should give his bond and mortgage for \$2000.

The denial is thus : he denies that in order to secure the repayment of the \$1900 it was agreed that Wire should give his bond and mortgage for \$2000. All this replication amounts to nothing, and a little less.

But the parts of the replication to which the remarks above made in relation to it particularly referred, is the next succeeding clause of it ; it is as follows : He admits that he did lend and advance to Wire at different times, before and at the time of executing the bond and mortgage, various sums of money, and in notes and obligations against good and solvent men, in all amounting to \$2000, and not to \$1900 only, as charged in the answer of Magic and Sandford. This is evidently a well-studied sentence ; and I am very clear that the complainant would be unwilling to have it considered as an oath that before and at the time of the execution of the bond and mortgage he lent and advanced, at various times, in money and notes and obligations, \$2000. It is evident that the sentence was framed in view of the fact testified to by Wire, that some two or three weeks after the bond and mortgage were delivered, Cummins came to him and said he was dissatisfied about the bond and mortgage, and gave him \$100 in notes of other persons, to make up the \$2000. Hence the sentence is, that he did lend and advance, at different times, before and at the time of executing the bond and mortgage, various sums of money, and (did lend and advance) in notes, &c., (without saying when or how much,) in all amounting to \$2000.

The next half of this paragraph is of the same character. It denies that before the whole sum of \$2000 was lent and advanced—that is, before he made up the additional \$100 as aforesaid—he agreed to receive, or Wire agreed to pay, \$100, or any other sum of money, for the loan or forbearance of payment of the said sum of \$2000.

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Now, this is not the charge. The charge is that, before the \$1900 was advanced, Wire agreed to pay, and he agreed to receive, \$100 for the loan and forbearance of payment of \$1900.

He closes his replication by saying he admits that Wire did offer him a carriage, after he had so loaned to Wire the said sum of \$2000 as aforesaid, but which, he says, he absolutely refused to receive, and never did receive.

I have disposed of this part of his statement before, and have shown that, under the testimony in the cause, he did receive it. His conscience, perhaps, was satisfied, so as to allow him to say he did not receive it, by the fact that his son Nelson took the horse from before the wagon and put the wagon into the wagon-house, and the wagon was called Nelson's. But did the father or the son ever pay anything for it? This device is puerile. He received the wagon.

The case, then, as it stood when the bond and mortgage were executed, is clearly proved as set up in defence by the answer of Magie and Sandford. It was a loan of \$1900, and the taking, therefor, a bond and mortgage for \$2000, and interest thereon. This is clearly usurious.

But it was said, in argument, that Cummins afterwards repented, and went to Wire and gave him notes of other persons to the amount of \$100, and this made up the loan to the \$2000. If it was not for the wagon affair, I should be called upon to consider the case in view of the decisions which were produced on the argument on this subject of penitence. But, at least, a court should be satisfied that the repentance was sincere, and sincerely acted upon. A mere change from \$100 in money to a wagon of the value of \$100 is not proof of repentance. The case, then, stands on its first ground—the ground on which it stood when the bond and mortgage were delivered; and if Wire's testimony is admissible, the defence, in the manner and form in which it is set up in the answer of Magie and Sanderson, is made out. If Wire's testimony is not admissible, then the defence, in the manner and form in which it is set up in the answer of Marsh and Willis, is made out.

It appears to me that Wire's testimony is admissible. This is a proceeding *in rem*. The costs will be paid from the pro-

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ceeds of the sale of the property, if the complainant succeeds; there would be no decree against Wire for costs. That he is a defendant in the suit is no objection to his being sworn, if he is not interested in the event of it, and interested on the side of the party calling him. Is he interested, and, if so, on which side? Is he interested to defeat the mortgage? Not unless the decree against the mortgage which might be procured by his testimony could avail him in an action against him on the bond. But it could not. If interested at all, then, it is not to sustain the mortgage, that the mortgage debt or a part of it may be paid out of the property. The benefit which has accrued to him from the amount paid by the purchasers of the equity of redemption would remain the same.

Wire's testimony being considered admissible, can it be held that both answers are sustained? It may be said that if the agreement was, to take a bond and mortgage for \$2000, and interest thereon, on advancing \$1900, which is the agreement as set forth in the answer of Magie and Sanderson and proved by Wire, it could not be an agreement to lend \$2000 and take a bond and mortgage for that sum, on an agreement between them that Wire should give Cummins a wagon of the value of \$100, which is the agreement as set forth in the answer of Marsh and Willis. This would be so if there had been but one agreement, and there had been no substitution of another agreement for it. But where the original agreement, as first executed, is for securing \$100 more than is advanced, and afterwards the lender, (at his own suggestion,) advances the additional \$100, and takes a carriage of the value of \$100, it must be considered in the same light as if the original agreement was to lend the \$2000 on bond and mortgage and take such carriage for doing it. Both answers are sustained.

The next question is, can these defendants, or either of them, take advantage of the usury? These defendants were made parties defendants as judgment creditors. After the filing of the bill, and before their answers were filed, they became purchasers of the lands at a sale thereof by the sheriff under judgments and executions at law, subject to all prior legal encumbrances.

It was held in *De Wolf v. Johnson*, 10 *Wheaton* 367, that

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the purchaser of an equity of redemption cannot set up usury in the mortgage; and, on the authority of that case, it was so decided by our Court of Errors, in the case of *Ward v. Plume*. Afterwards, a case in which I was concerned as counsel, the case of *Mathews against Roberts and Ogden*, came up before our Court of Errors, and the subsequent case of *Lloyd v. Scott*, 4 *Peters* 205, 229, was produced, overruling the case of *De Wolf v. Johnson*; and our Court of Errors sustained the defence made by the purchaser of the equity of redemption. I am not disposed to question the authority of that decision. But it was said, in argument, that when the bill was filed, these defendants were only judgment creditors, and that they should not be permitted, after the bill was filed, to put themselves in a better position to make the defence by purchasing the equity of redemption. I do not see that this is a sound position. Nor do I see any reason why a judgment creditor, as such, may not make the defence. He has a lien on the property; and for that reason is made a defendant in a foreclosure suit. He may redeem. Has he not an interest in the land sufficient to authorize him to question the validity of any prior lien? Why is he made a defendant, if he cannot question the mortgage? Cannot a subsequent mortgagee set up usury in the first mortgage?

In the case of *Green v. Kemp*, 13 *Mass.* 415, Woods, after mortgaging the premises to Green for \$1000, released and guaranteed to Kemp all the right in equity of redeeming which he had in the premises, for \$100. The court, in that case, said that Kemp had no title in the land before redeeming, for he bought only a right to redeem, and therefore he could not be permitted to avoid the mortgage for usury. But the court, in the same case, say that if he had bought the land he might avoid a previous usurious mortgage, though he had notice of the mortgage before he purchased.

In this case Magie and Sanderson bought the lands at a sheriff's sale on a number of executions, including an execution of their own, for \$2700, the highest bid, and received the sheriff's deed therefor in the usual form, subject to all legal prior encumbrance. I am of opinion that such a purchaser can set up usury in a mortgage existing on the premises at the time of the sale.

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I am of opinion, also, that when a bill is filed to foreclose, and judgment creditors are made parties, and before the time for answering comes, one of the judgment creditors, a defendant in the bill, buys the property at sheriff's sale under the executions at law, he may, in his character of purchaser, set up usury in the mortgage.

In this view of the case, the bill must be dismissed. It will be dismissed without prejudice to the rights of Amos Kennedy, the subsequent mortgagee mentioned in the bill, whatever those rights may be.

The objection made to the examination of Wire as a witness, on the ground that no order for his examination was signed, cannot be allowed to prevail under the circumstances. A paper purporting to be a certified copy of an order for the examination of Wire, and of the signature of the Chancellor thereto, was sent by the clerk to the solicitor of the defendants; but by some oversight the original order was not presented to the Chancellor for his signature. These orders are very much of course. A party examined as a witness between other parties is examined subject to all exceptions; and he may be objected to at the hearing, if interested, though the objection has not been previously made.

Bill dismissed.

CITED in *Brolasky v. Miller*, 4 Hal. Ch. 790; *Brolasky v. Miller*, 1 Stock. 811, 815; *Andrews v. Stille*, 8 C. E. Gr. 479.

CASES IN CHANCERY.

MARCH TERM, 1847.

ADAM KINNAMAN v. JOHN HENRY AND RICHARD HENRY.

1. In May, 1817, J. purchased land of K. and paid part of the consideration money and gave K. a mortgage on the land for the residue. J. sold parts of the land, and K. released these parts from the mortgage.

2. In August, 1821, judgments were recovered, in favor of other persons, against J., on which executions were issued and levied on that part of the mortgaged premises still held by J., "subject to prior encumbrance."

3. In October, 1822, pending a suit in this court by K. against J. for the foreclosure of the mortgage, J. and his wife re-conveyed that part of the mortgaged premises which he still held, and which had been levied on as aforesaid, to K., in payment and discharge of the mortgage, and K. took possession of the land; the registry of the mortgage, however, was left uncanceled. Afterwards the sheriff sold, under the said levy, and H. became the purchaser; H. when he so bought, having knowledge of the foregoing facts. *Held*, that H. was not entitled to the land free from the mortgage debt; but that K. must be considered in the light of a mortgagee in possession, and H. as only entitled to redeem on payment of the mortgage debt.

4. It is of the utmost importance that defendants be held to the established rules for answering.

5. It is not sufficient for a defendant to say he has no knowledge of a fact charged in the bill.

The facts are sufficiently stated in the opinion of the court.

William Halsted, for complainant. He cited 6 *John. Ch.* 393, 5; *Walker's Ch. Rep.* 261; 2 *Ves., Jun.*, 437; 16 *Ves.* 249; 3 *Paige* 421; 5 *Binney* 134; 12 *John. Rep.* 190; 1 *John. Ch.* 298, 394; 4 *Ib.* 7; *Story's Eq. Pl.*, page 803, 812; *Cooper's*

Pl. 315 ; 8 *Ves.* 87 ; 5 *Dana* 85 ; 3 *Halst. Rep.* 282-3.

Peter D. Vroom, for defendants. He cited 2 *Cowen* 246 ; 1 *Watts and Sey.* 485.

THE CHANCELLOR. In May, 1817, Adam Kinnaman sold to James Johnson two tracts of land in the township of Mansfield, then a part of Sussex county, for \$2900 ; received \$1000 of the consideration money, and took his bonds and a mortgage on the same land for \$1900, the balance of the consideration money. Johnson, in December, 1817, sold a part of each tract to one Fitzer, which Kinnaman released from the mortgage. The mortgage to Kinnaman was recorded on the day of its date. At the term of August, 1821, of the Common Pleas of Sussex, Lewis Johnson recovered a judgment against James Johnson, for about \$584 ; and at the same term of the said court, William Weller obtained a judgment against James Johnson and the defendant Richard Henry, for about \$1140. Executions were issued on these judgments. The execution against James Johnson alone was levied on a farm in the township of Mansfield, "said to contain 160 acres," (which included the lands bought by James Johnson of the complainant,) and also on a lot in the township of Greenwich, "said to contain 10 acres," "all subject to prior encumbrances." The execution against James Johnson and Richard Henry was levied on a farm in Mansfield, (I take it to be the same farm which was levied on by virtue of the execution against Johnson alone,) and on a house and lot in the village of Asbury, in the possession of Richard Henry, and also "on a lot of land in the same township, said to contain 30 acres ; likewise on one other lot in the township of Mansfield, said to contain 20 acres, bounded by lands of Thomas Schureman and others, all subject to prior encumbrances." On the 8th October, 1822, pending a suit in this court brought by Kinnaman for the foreclosure of the mortgage so given by James Johnson to him, Johnson and wife reconveyed to Kinnaman, in payment of the mortgage debt, the two tracts so bought of Kinnaman and mortgaged to him, (except the parts thereof which had been sold and conveyed by Johnson to Fitzer and released by Kinnaman,)

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and Kinnaman thereupon gave up to Johnson the bonds and mortgage, and took possession of the lands so reconveyed, and has been in possession ever since. The deed of reconveyance was recorded April 10th, 1823. The mortgage to Kinnaman remained uncanceled of record. Afterwards, the sheriff sold the property levied on by virtue of the said executions, including the lots so mortgaged and reconveyed to Kinnaman, and made a deed therefor to the defendant John Henry. Henry, when he bought at the sheriff's sale, knew that Kinnaman had sold these lands to Johnson, and that Johnson gave Kinnaman a mortgage thereon for the residue unpaid of the consideration money, and that Johnson had reconveyed the lands to Kinnaman in discharge of the mortgage debt, and that Kinnaman thereupon took possession, and was in possession at the time of the sheriff's sale. The question is, whether the purchaser at the sheriff's sale acquired a title to these lots free and unencumbered. If, on the facts as thus stated, he did not, the decree in the case must be for the complainant; and it will be unnecessary to go into a more particular detail of the evidence in the cause.

At the time of the levy of the executions, the mortgage was recorded, and was the prior lien. Of this fact the purchaser at the sheriff's sale was chargeable with notice. The levy was subject to the mortgage; Johnson's equity of redemption only was levied on. Before the sale by the sheriff, Johnson had reconveyed the lands to the mortgagee in discharge of the mortgage debt. At the time of the sheriff's sale, Johnson, the defendant in the execution, had no interest whatever in the lands. What interest in the land, then, could be sold on the execution against Johnson levied on his interest while he had an equity of redemption in it? Could a greater interest than Johnson ever, at any time, had in the lands, be sold on an execution against Johnson? Certainly Johnson's reconveyance to Kinnaman gave Johnson no greater interest in the land than he had before. That act deprived him of all interest in the land, instead of adding to or increasing his interest that had been levied on.

It was said, in argument, that the levy was on the land subject to the mortgage, and that if, at the time of the sheriff's sale, the mortgage was paid, the purchaser at that sale bought the land,

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and, there being then no mortgage on it, he got it unencumbered. This would be so if he paid off the mortgage and held the land, or if he had paid off the mortgage and conveyed the land to a third person ; but it is not so when he conveys the equity of redemption to the mortgagee, and gives up possession to the mortgagee, in discharge of the mortgage debt. The interest he thus conveys is simply his equity of redemption, the interest that had been levied upon. To say that if, after a levy on a mortgagor's equity of redemption, he conveys it to the mortgagee in discharge of the mortgage, the whole estate in the land, as well the interest of the mortgagee as that which the mortgagor had at the time of the levy, may be sold under such levy, is a proposition which cannot be maintained.

The equity of the complainant's case does not rest on the idea that Johnson got the bonds and mortgage by promising to pay the judgments, or by misrepresentations that he had paid them, or on the idea that the understanding was that he had paid off the judgments. The complainant cannot be subjected to the loss of his estate in the lands because, on receiving a conveyance of Johnson's equity of redemption and the possession, in discharge of his prior lien, he did not insist that the subsequent liens should be first paid off.

The complainant must be considered in the light of a mortgagee in possession, and the purchaser at the sheriff's sale as having no other interest in the lands than the right to redeem them, on payment of the amount of the mortgage debt, and interest, less the value of the rents and profits since the complainant has had possession.

I have a remark to make in reference to the answer filed in this cause.

In several respects it is open to animadversion. I have had occasion to remark before that it is of the utmost importance that defendants be held to the established rules for answering. One of these rules is, that it is not sufficient for a defendant to say he has no knowledge of a fact charged in the bill. He must answer as to his knowledge and information. This rule has not been observed in the answer in this case.

Gordon et al. v. Barkelew et al.

SAMUEL GORDON AND WIFE ET AL. v. STEPHEN BARKELEW
ET AL.

1. A deed in the form of bargain and sale, in consideration of \$1 and of love and affection, to one son, his heirs and assigns forever, to have and to hold to the use and benefit of the said son and his wife and their heirs and assigns forever, is, unless a different intention can be made to appear, an advancement to the son.

2. A father put one of his sons in possession of lands, which he occupied twenty years, and then sold; and the father made the deed to the purchaser, and the son received the consideration money. *Held*, to be an advancement.

3. A father put a son in possession of a house and lot, which the son occupied during the father's life—more than twenty years—and on which, with the knowledge of the father, he made large improvements. If the value of the house and lot, without the improvements, be not equal to a share of the whole real estate to be divided, the house and lot may be set off, in the division, to the son, at its value without the improvements.

4. If the value of the house and lot, without the improvements, be greater than a share, the house and lot may be set off to him, and he be directed to pay so much as will equalize the shares.

5. A child who has received an advancement cannot be compelled to pay anything on account of it to the other children.

Bill for partition of the real estate late of Runyon Barkelew, deceased. It was filed by Samuel Gordon and Abigail his wife, John D. Servis and Elizabeth his wife, and Ann Rue—the said Abigail, Elizabeth and Ann being daughters of the said Barkelew, deceased—against Vincent Barkelew and Stephen Barkelew, sons of the said deceased, and the children of Abraham Barkelew, another son of the said decedent, who is dead.

The bill describes the real estate of which partition is sought, consisting of several tracts, one of which is described as a house and lot in the occupancy of the defendant, Vincent Barkelew, a son of Runyon Barkelew, deceased, and states that about the year 1810, Runyon Barkelew, since deceased, advanced Abraham by conveying to him and his wife, jointly, in fee, a farm called the Dunham farm, containing about 100 acres. That Abraham, wishing to make improvements on the said farm, with moneys which had come to him through Jane, his wife, and she

being unwilling that said moneys should be used for that purpose unless the said Abraham would give her some interest in the land, agreed to give his said wife an interest in the farm, and procured the deed from his father for the said farm, to be made to him and his said wife jointly. That many years ago, the said Runyon Barkelew, deceased, also gave and advanced to his said son Stephen two parcels of land, describing them, both of which Stephen took possession of and occupied as his own, but without having any deed therefor, for upwards of twenty years, when he sold them to William Messler, for \$870, which he received to his own use, his father, at his request making a deed therefor to the purchaser. That the said Runyon Barkelew, deceased, also, in his lifetime, gave and advanced to the complainant Elizabeth a lot of land, of eight acres, which was conveyed to trustees for her use during her life and after her death to her heirs. That the lands so given to Abraham, Stephen and Elizabeth were intended by the said Runyon Barkelew, deceased, and received by them as advancements. The bill then states certain facts as evidence that advancement was intended.

Vincent Barkelew put in an answer to the bill. He admits the facts stated in the bill, except as follows: as to the allegation, in the bill, that Runyon Barkelew, deceased, in his lifetime, made a statement in writing of the amounts at which he valued the real estate given by way of advancement to his sons Abraham and Stephen, and which he, the said Runyon, intended should be deducted from their respective shares of his real estate, as in the bill is charged, this defendant says he is entirely ignorant of any such statement having been made, and that he neither admits nor denies it. That, as to the house and lot in the bill mentioned as being in the occupancy of this defendant, he says that the said premises consist of a lot of land, with a dwelling-house and out-buildings thereon, and a wharf; and were purchased by the said Runyon Barkelew, deceased, from one Dunham, about the year 1811, for \$2250. That the said premises were, when so purchased, and had been for some time before, in the occupancy of this defendant, who had then just come of age and commenced business for himself. That the said Runyon Barkelew, deceased, having it then in contemplation to make

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advancements out of his real estate to this defendant as well as to his two other sons, Abraham and Stephen, consulted with this defendant as to the purchase of the said property for this defendant; and that, it being deemed suitable for this defendant, the said Runyon Barkelew purchased it, and gave it to this defendant. That the said gift was absolute, and was intended by the said Runyon Barkelew as an advancement out of his real estate to this defendant, it being at the time deemed equivalent in value to what would be the equal share of this defendant in the real estate of the said Runyon at his decease. That at the time the said purchase was made, the said Runyon proposed to this defendant that the deed for the said property should be made to this defendant; but that, having just entered into mercantile business, he declined taking the deed in his own name, and suffered it to be made to the said Runyon, his father. That from that time to the present, a period of more than thirty years, the said property has always been possessed by this defendant, and claimed and considered as his own; and that the said Runyon, also, in his lifetime, always treated and considered it as belonging to this defendant. That when the said property was so purchased from Dunham, the whole of the purchase money was not paid; but that a mortgage on the property was given to Dunham for a part thereof. That this mortgage remained unpaid several years, during which time this defendant paid to Dunham the interest thereon; and that when the mortgage was finally paid off, he, this defendant, paid a portion of it, though he is unable to specify precisely the amount he paid, having never kept any account thereof. That he made large and expensive improvements on the property, at his own expense, and, in the year 1816, built a wharf on the premises, 300 feet long and eight feet high, at a cost of \$2000. That in 1822 he expended \$1100 in repairing the said wharf, and that, in 1840, he expended the further sum of \$200 in repairing the same. That in 1828 and 1829, he repaired the dwelling-house and built a large addition thereto, consisting of two rooms below, four rooms above and a cellar; and that he also built a wagon-house, smoke-house and lime-house thereon, the whole of which cost \$1000. That the said improvements have rendered the said property of

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double the value it was when it was purchased, and were made in reliance on the gift of the property, so made to him. That the value of the said property when purchased does not exceed his equal share of the real estate of the said Runyon, on a division of the said real estate including the said property; and that the said property could not be divided without great detriment to the value thereof. He claims to hold the said property against any claim of the other heirs, but, if he has not a right so to hold it, he submits that in any partition of the real estate of said Runyon Barkelew, deceased, the said premises should be assigned to him; he submitting that if the original value of the premises, excluding the improvements, exceeds his equal share, he will pay the excess.

The joint and several answer of the other defendants, except Stephen, was also put in. They admit the conveyance, in the year 1810, by Runyon Barkelew, deceased, to his son Abraham, and Jane, the wife of Abraham, as joint tenants, in fee, of the Dunham farm, for the consideration of love and affection and of \$1. They say they neither admit nor deny that the said Runyon, deceased, advanced to his son Stephen the lands in that respect mentioned in the bill, they knowing nothing on the subject, of their own knowledge; and they leave the complainants to prove, &c. That they neither admit nor deny the pretended advancement alleged to have been made to Elizabeth Lewis, or for her use, but leave the complainants to prove the same. But they deny that the conveyances and sale by Runyon Barkelew, deceased, to his son Abraham, were intended by said Runyon as an advancement out of his real estate to his son Abraham, or were received by Abraham as such advancement.

The defendant, Jane Barkelew, widow of Abraham, answering for herself, says that, being one of the grantees of the said 100 acre tract conveyed to Abraham and her jointly, she was consulted in all matters touching the said conveyance, and took a principal part in the matter; and that she never heard it mentioned by any one, at the time, that the said conveyance was to be considered as an advancement to Abraham, and for which he was to account after the death of his father. That if there had been any such understanding, the said conveyance would never

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have been made or received. That before, and at the time of the said conveyance, her said husband was desirous of removing from the village of Washington, where his said father resided, and had purchased property in New Brunswick, with a view of removing thither, and had made arrangements to do so. That said Runyon urged and insisted that Abraham should not leave him, but should remain with or near him to assist him in his affairs, and voluntarily offered and proposed to give and convey the said lands to Abraham, if he would consent to live thereon, and assist him in the business and affairs of the said Runyon. That she objected to receiving the said deed and the lands thereby conveyed. That the said Runyon expressly told her, that if she and her said husband would consent to take the said lands and reside upon them, Abraham's share in the remainder of his estate should not be any the less in consequence of the said conveyance. That the said proposition and request of Runyon were yielded to with reluctance at the time, because her said husband and she were very anxious to go elsewhere, and because the said lands were, at the time, very poor and unproductive, and scarcely worth cultivating. That when the conveyance was made, it was absolute; the consideration money was paid, and not a word was said, by any one, about its being an advancement. That, sometime previous to the death of the said Runyon, the complainant, Samuel Gordon, as these defendants understood, caused it to be told in the neighborhood that the said conveyance was intended as an advancement, and that she, the said Jane, in the presence of the defendants, Mary Barnes, Abraham Barkelew, and William Barkelew, inquired of the said Runyon if such story was true, that the said conveyance was intended as an advancement, to be afterwards accounted for by the said Abraham; and that the said Runyon then and there declared that the said representations were not true; that the said conveyance was not intended as an advancement to be afterwards accounted for; and that they need not give themselves any further trouble about the matter. And this defendant denies, so far as she knows or believes, that the said Runyon, in his lifetime, ever caused or directed the complainant, Samuel Gordon, to make a statement in writing of the amounts at which he, Runyon, valued the lands

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alleged to have been advanced, as aforesaid, by way of manifesting his intention in regard to the said conveyance. She denies that he ever kept or made any record or memorandum touching the said conveyance to Abraham; and charges that if any such paper was found among his papers, it was the unauthorized device of the said Samuel Gordon or of some other person or persons; and she denies, as far as she knows or believes, that Abraham was present at the time of making such written statement and assented thereto and acknowledged the same to be correct. She insists that the representatives of Abraham are entitled to their full share of the real estate of which the said Runyon died seized, without any regard to the said conveyance made to Abraham; which, she submits, was made for the considerations aforesaid, and not as an advancement to be accounted for by Abraham or his representatives.

The defendant Stephen Barkelew did not answer the bill, and a decree *pro confesso* was taken against him.

A deed from Runyon Barkelew and his wife to their son Abraham and Jane his wife, dated June 18th, 1810, of a farm of 100 acres, for the consideration of \$1, and natural love and affection, to have and to hold to the said Abraham, his heirs and assigns forever, to the only proper use, benefit and behoof of him, the said Abraham, and Jane his wife, their heirs and assigns forever, was exhibited on the part of the complainants.

It was proved that Abraham took possession of this farm.

Henry Gordon, a witness called for the complainants, testifies, among other things, that about two years before Runyon Barkelew's death, he saw in said Barkelew's hand the paper marked Exhibit B on the part of the complainants. That said Barkelew, his sight being then defective, handed certain papers to the witness to read and state the contents thereof to him, the said Barkelew. That among the said papers was the said Exhibit B, or one very similar to it.

On his cross-examination, he says he has no doubt that the paper marked Exhibit B is the paper he saw in said Barkelew's possession.

The witness says he is acquainted with the property charged in Exhibit B to Vincent, a son of Runyon Barkelew. He fur-

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ther says that, independent of the paper Exhibit B, he should have recollected that Vincent, Abraham and Stephen were charged with property on that paper.

Henry Shults, sworn for the complainants, says he was one of the administrators of the personal estate of Runyon Barkelew, deceased; that he saw Exhibit B when they were taking the inventory. They found it among the papers of the said Runyon, there described. Exhibit B is a memorandum, dated October 11th, 1836, in which Vincent, Abraham and Stephen are charged as Dr. to the estate of Runyon Barkelew; Vincent Barkelew to the house and lot in the village of Washington which he "now occupies" \$2250
 Henry Obert's lot..... 1005
 Abram Barkelew, to farm..... 1500
 Stephen Barkelew, to lot of land of Robinson Thomas, \$450; one lot of Forman Throckmorton, \$400; cash, \$300.

No evidence was produced on the part of the representatives of Abraham, in support of the allegations of their answer, on which the said answer claims that the farm deeded to Abraham and his wife should not be considered an advancement.

As to the house and lot in Vincent's possession, which the bill includes among the property a partition of which is sought, the testimony shows that Vincent has been in possession of it about 35 years, and that he expended large sums of money on it, in the lifetime and with the knowledge of Runyon Barkelew, deceased, in building out-houses on it and an addition to the dwelling-house, and in building a wharf on it at great expense; but that his father never made a deed to him for it.

As to the two lots stated in the bill to have been advanced to Stephen, the testimony supports the charges in the bill.

The cause was heard on the pleadings and proofs.

Henry V. Speer, for the complainants.

John Van Dyke, for the representatives of the deceased son Abraham.

Cases cited for the complainants: *Roberts on Fraud. Convey-*

ances 74, 75, 373; *Id.* 40, note 3; *Stark. Ev.* 1004; 16 *John. Rep.* 47; 7 *Ves., Jr.*, 519; 1 *Penn. Rep.* 291; 3 *Paige* 546.

THE CHANCELLOR. There is nothing in the proofs in the cause to overcome the evidence furnished by the deed from Runyon Barkelew, since deceased, to his son Abraham, since deceased, and the wife of Abraham, that the farm conveyed by that deed was an advancement.

A deed in the form of bargain and sale, from a father, in consideration of \$1, and of love and affection, to one of his sons, his heirs and assigns forever, to have and to hold to the use and benefit of the said son and his wife, and their heirs and assigns forever, is, unless a different intention can be made to appear, an advancement to the son. 2 *Atk.* 635.

As to Stephen's right in the descended estate, his father put him in possession of lands, which he occupied twenty years and then sold, and the father made the deed to the purchaser and Stephen received the consideration money. I think this, also, must be held to have been an advancement to Stephen.

As to Vincent, the father put him in possession of a house and lot, thirty-five years ago, which he has occupied ever since, and on which, with the knowledge of his father, he has made large improvements at his own expense. Whether this is to be considered an advancement or not may not be material. It will not be material if the value of the house and lot, without the improvements, be not equal to the value of what would be the share of Vincent in the whole real estate to be divided, including the house and lot, for the court, under the circumstances, would direct the house and lot to be assigned to Vincent, at its value without the improvements. If its value without the improvements be greater than his share as aforesaid, then it will be necessary to determine whether it was an advancement. If it was, then he could not be compelled to pay anything to the other heirs on account of it. But if it was not, the court would direct the house and lot to be assigned to him on his paying the excess of its value over a share, such excess to be so divided among the heirs as to equalize their shares.

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A partition will be decreed, and to that end, and before directing a commission to make the partition, the proper reference will be ordered.

Order accordingly.

SAMUEL LANNING v. ISAAC COLE.

1. S. L. being seized of lands which were encumbered by mortgage and judgments, made a will devising the same. The lands were afterwards sold under the executions issued on the judgments, and bought at the sheriff's sale by I. C. An agreement was afterwards made between I. C. and S. L. that on S. L.'s paying to I. C. the amount of the purchase money, and interest thereon, in six months, I. C. would convey the premises to S. L. S. L. filed his bill, stating that he had tendered the money required by the said agreement and demanded a conveyance, but that I. C. refused it, and praying a decree for the performance of the agreement.

2. An opinion was pronounced in favor of the complainant, but before the decree was signed the complainant died. Leave was given to file a bill of revivor. *Held*, that the heirs-at-law of S. L. were the proper persons to revive or prosecute the suit; that the executor and the persons interested in the personal estate under the will of S. L. should be made parties.

3. A, owning land, makes a will devising it. The land is afterwards sold on execution. An agreement is then made between the purchaser at the sale on execution and A, that the purchaser, on A's paying him what he gave for the property and interest on it in six months, will convey the property to A. A afterwards died. *Held*, that the interest acquired by A in the land under the said agreement did not pass by the will.

4. A will, as to land, speaks only as of the time of making it; as to personalty, it speaks as *in articulo mortis*.

In July, 1840, Samuel Lanning exhibited his bill, stating that he was lately seized in fee of lands in the city of Camden, on which he had erected six three-story dwelling-houses, at a cost of \$12,000, independent of the value of the land, and that the same will rent for the interest of \$20,000; that he had encumbered the premises by a mortgage of \$3500, and that there were other liens thereon, by judgments, exceeding \$2000; that

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executions were issued on the judgments, to the sheriff of Gloucester, and that the said sheriff, on the 3d October, 1839, proceeded to sell the whole of said premises in one parcel. The bill states that the advertisements and adjournments of sale made by the sheriff were irregular, and insists that the whole proceedings of the sheriff were unlawful. That the whole property was struck off in one parcel, and sold to the defendant, Isaac Cole, for \$3060. The bill states that Cole, on the day of the sale, circulated divers false representations as to the complainant's title to the premises, (stating them,) thereby depreciating the value of the premises, and discouraging persons from bidding. That so flagrant was the conduct of Cole and the sheriff, in reference to the sale, that the complainant resolved to impeach it as fraudulent, and to prevent the delivering of a deed; and that Cole, being aware thereof, made several proposals to him, and, on the 28th November following, entered into an agreement in writing with the complainant, under his hand and seal, by which he agreed that the complainant should have six months from the 26th October preceding to raise the amount of the purchase money paid by Cole, and the costs and expenses incident to the sale, with interest; and that on the payment thereof, he, Cole, would convey the premises to the complainant, provided he, the complainant, should raise the money on mortgage of the premises for the term of five years and for his sole benefit; the said Cole to have, from the date of the agreement, the possession of the premises, and to receive the rents thereof; and that on the re-payment of the purchase money, &c., as aforesaid, he should account for the rents, after deducting repairs. That on the delivery of the said agreement to the complainant, he permitted Cole to take possession. That on the 25th April, 1840, he tendered to Cole the amount required by the said agreement, and demanded a reconveyance, but that Cole refuses, &c.

The bill seeks a specific performance of the agreement.

The defendant answered the bill, and depositions were taken; and the cause was brought to hearing on the pleadings and proofs, before Chancellor Pennington, and at the October term, 1842, the Chancellor pronounced an opinion.

On the 11th July, 1844, on its being made to appear that the

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complainant had died after the opinion was pronounced, no decree having been signed, and on motion in behalf of Joseph Porter, administrator *cum. test. annex.* of Samuel Lanning, Chancellor Haines made an order granting leave to file a bill of revivor, &c., on that day, for the purpose of reviving the suit in the name or names of some proper complainant or complainants, without prejudice to the question of the right of the complainant to file such bill.

On that day a bill was filed by Joseph Porter, administrator with the will annexed, stating the filing by Lanning, on the 20th July, 1840, of an original bill against Cole, and referring to that bill for the contents thereof, and the issuing of process thereon; and that the defendant thereto answered the said bill; and that such proceedings were had in that cause that at the October term, 1842, of this court, the Chancellor delivered an opinion in favor of the complainant therein; and that the agreement set forth in the said original bill should be specifically performed; and that it should be referred to a master to ascertain, &c. That after the said opinion was delivered, a draft of a decree, in conformity thereto, was prepared, (setting forth the draft.) That before the said draft was signed, and on the 10th September, 1842, Lanning died, leaving a will, of which Amos Bullock was thereby appointed executor. That Bullock renounced the executorship, and that on the 6th February, 1843, administration with the said will annexed was granted to the said Joseph Porter. This bill then states that the said Lanning, being seized of the said property at the time of the making and publishing of his said will, and up to the time of the sale thereof by the said sheriff, did, by the said will, give and devise the same to the executors therein named, in trust, until the youngest child of his son Paul shall attain 21 years, to be rented out by his executors, and the rents, after defraying the expenses of repairs, to be disposed of as follows: \$50 annually to be paid to his grand-daughter, Mercy Lanning, and \$50 a year to each of his grand-children, Charles, Sarah, Hannah, Ann and Samuel Lanning, children of his son Paul, after they shall respectively attain 21 years, until the youngest child of his son Paul shall attain 21 years; and the remainder of the net proceeds he directed his execu-

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tors to pay, annually, to his daughter-in-law, Rachel Lanning, for the purposes therein mentioned, and he directs the executors to sell the property when the youngest child of Paul shall attain twenty-one years, and to divide the proceeds of the sale into eight equal parts, and to pay one part to the said Rachel, wife of his son Paul; but if she dies before the sale and division, to pay this share to her children, except the daughter Mary; the will disposing of the other shares among the children of Paul some of whom are minors.

The bill then states that the said original suit abated by the death of the said Samuel Lanning, and that the complainant, Porter, as he is advised, is, as administrator with the will of said Lanning annexed, entitled to have the said suit revived against the said Cole, and to have a decree therein perfected and carried into effect, in the same manner as the complainant, Lanning, if living, might have had.

To this bill the defendant demurred.

Wm. N. Jeffers, in support of the demurrer.

Abraham Browning and William Pennington, contra.

They cited *Story's Eq. Pl.*, §§ 354, 356, 626, note 5, 378, 379, 380; 1 *Green's Ch.* 363.

THE CHANCELLOR. The question involved in this case must be decided on the principles which would be applicable to it if Samuel Lanning had never had any interest in this real estate except what Cole's agreement to convey it to him gives. The sale of the property by the sheriff divested him of the interest he theretofore had in it. No proceeding to set aside the sale was had; and for the purposes of the present inquiry that sale must be taken to have been valid. The interest which Lanning acquired in the lands under the agreement of Cole to convey the same to him, was a descendible and devisable interest. This interest descended to his heirs; it did not pass by the will he had made and published before he had acquired it.

A will, as to land, speaks only as of the time of making it;

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as to personalty, it speaks *in articulo mortis*, though made long before. The fact that at the time he made the will he was the owner of these lands, and devised them specifically, can make no difference in the application of this principle.

All his interest was subsequently divested. It will not be contended that the interest he then had passed by the will. What interest, then, could he devise? Certainly, only the interest he acquired under this agreement. But that interest was acquired subsequently to the making of the will, and could not pass by it. The equitable interest, then, which Lanning acquired under the agreement, descended to his heirs-at-law; and the heirs are the persons interested in the specific performance of the agreement. The executor should be a party to the proceeding, because, if there be personal property sufficient, he will be decreed to pay the purchase money for the benefit of the heirs. And the persons entitled to the personal estate under the will should also be made parties.

In this view of the case, even if a decree had been signed by the Chancellor, the lands would not have passed by the will. The executor of the will, then, is not the proper person to revive or prosecute the suit.

The demurrer must be allowed.

Order accordingly.

LEWIS McBRIDE v. THE EXECUTORS OF EBENEZER ELMER
ET AL.

1. E. E. bequeathed to "The Bridgeton Trustees for Free Schools" \$1000, the interest to be applied annually for ages as far as may be practicable, for the tuition of poor children, without regard to denomination or color, in the elements of English literature.

2. There was no such body as "The Bridgeton Trustees for Free Schools;" but there were in the town of Bridgeton, trustees of public schools, (usually called free schools,) as established by the statute respecting public schools.

3. The bequest was held good as a trust to be executed; trustees were appointed by the court.

This is an amicable suit brought for the purpose of settling a question arising upon the will of Ebenezer Elmer, late of Bridgeton, in the county of Cumberland, deceased.

The bequest on which the question arises, is as follows:

"I give to the Bridgeton trustees for free schools one thousand dollars, the interest to be applied annually for ages as far as may be practicable for the tuition of poor children, without regard to denomination or color, in the elements of English literature."

The case was submitted on bill and answer and written briefs.

Henry W. Green, for the complainant.

The intent of the testator is obvious. It was to provide a permanent fund for the instruction of poor children in the common branches of an English education. Nor can there be any mistake as to the objects of his bounty. They are the poor children of the town of Bridgeton, where the testator resided.

The design of the testator, doubtless, was to give the money to the trustees of *common* schools, (usually called free schools,) as established by the law respecting common schools, in the town of Bridgeton.

But a difficulty arises.

1. From the supposed inability of the trustees to take under the will.

2. From the fact that there is more than one free school in Bridgeton.

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Admitting for the sake of the argument, that the bequest is void at common law, that the trustees are incompetent to take a legacy, shall the legacy therefore fail?

It is insisted on the part of the complainant that the doctrine of *cy pres*. applies.

In England this question has long been at rest, and the exercise of the power is one of the most ordinary and familiar subjects of chancery jurisdiction.

And the subject has lately been so fully and ably discussed, and settled by so high authority, and upon so satisfactory a basis, that little else is deemed necessary than a mere reference to the authorities.

The difficulty with the question in the courts of equity of this country has been that the statute 43 of Elizabeth, chap. 4, (the statute of charitable uses) has never been enacted here. And the idea was entertained that the doctrine of the Court of Chancery, in regard to charities and the jurisdiction of the court over them, originated in that statute.

That was the doctrine adopted by the court in *Baptist Association v. Hart's Ex'rs*, 4 *Wheaton* 1, and the decision in that case proceeded upon that idea.

But it has since been clearly shown that that opinion is erroneous. That the Court of Chancery has jurisdiction of charities by virtue of its inherent powers. That it was derived, not from the statute of Elizabeth, but from the civil law or from the common law; and that it both held and exercised the jurisdiction long anterior to the statute of Elizabeth.

See *Vidal v. Girard's Ex'rs*, 2 *Howard* 127; *Burr's Ex'rs v. Smith*, 7 *Vermont* 241; *King v. Woodhull*, 3 *Edwards* 79.

I refer particularly to the argument of George Wood, Esq., in 7 *Vermont* 241; to that of Horace Binney in the *Girard* will case, printed in pamphlet, pp. 113 to 137. And to the opinion of Judge Baldwin in the case of Sarah Banes, in the Circuit Court of the U. S., April term, 1833, pamphlet, pp. 41, 2, &c.

Numerous American cases in support of the same doctrine will be found referred to by Mr. Binney, in 2 *Howard* 164.

The doctrine of charitable uses and the power of a court of equity over them, may now be considered as definitely at rest.

It is certainly somewhat remarkable that it should not have been settled at an earlier day. It may be explained by the fact that in this country, and particularly in this state, there are but few legacies to charitable uses, and those generally very small in amount.

The subject is daily assuming more importance. It is a highly salutary exercise of jurisdiction, and for the court to deny the power would be to divest itself of one of its most beneficial prerogatives.

Though cases have not arisen, yet they exist, and will be brought before the court.

A legacy is given to the trustees of an unincorporated religious society, in trust, to educate all the poor children within its limits. Would the court say that the legacy must fail, or refuse to execute; or, suppose that numerous legacies of that kind should have been given, a large fund accumulated, and (as has lately happened,) the society should be dissolved; would the court of equity suffer the fund to be squandered, or claimed by the individual in whose hand it happened to be? Would the court not appoint trustees and enforce the trust?

In the present case we need not call to our aid the doctrine of *cy pres*. The trust and the objects of his bounty are sufficiently clear, and the intent may be carried into effect. It is only required that the court of equity should establish the trust and appoint suitable trustees to execute the trust.

The object of the bequest is a charity. A gift for the support of schools, or the promotion of education, is a charity; and "poor children" is a sufficient designation of the objects of the bounty. *Att'y-Gen. v. Williams*, 4 Bro. C. C. 526; 2 *Roper on Legacies* 101.

Equity will not permit a charitable bequest to fail, either for want of trustees, or because the objects of the testator's bounty are indefinite, if the general intent is apparent, and if the will cannot be executed precisely in the mode the testator directed, the court will execute the intent *as near as may be*. The English cases go much further than is at all necessary to support the present claim. 2 *Roper on Legacies* 140, § 5.

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Lucius Q. C. Elmer, for the defendants.

The question in the case is, whether the Chancellor, in the absence of any statute similar to the English statute of Elizabeth, can execute the bequest by means of the doctrine of *cy pres*.

Without meaning to do much more than to refer to the cases within my reach, or to which I have references, it is with considerable confidence insisted that the Chancellor of New Jersey has no such power. He does not, like the English Chancellors, represent the king or government as *parens patriæ*; but, under the constitution of this state, is simply a part of the judiciary, holding, as such, the Court of Chancery.

That the bequest in this case is void at the common law, I presume, will not be disputed, there being no person or persons *in esse* capable of taking and fulfilling the trust in perpetuity; and there being no designation of the persons who are to be benefited, there is neither a designated trustee nor definite *cestuis que trust*.

Nor is it a case where the executor can be held to be a trustee, and charged, under the authority of the court and by its aid, with the execution of it. This trust, if good at all, must be perpetuated. The objects or persons to be benefited are wholly indefinite, so that, to effect the object, the court must not only set up and constitute trustees and make them at least a *quasi* corporation, but it must, also, from time to time, regulate the mode of their procedure. The court must, of necessity, lay down rules for ascertaining who the "poor children" are that are to be instructed, or must leave this to the unregulated direction of persons not selected by the testator. It is, in short, a case where the prerogative superintending power of government must be called in to supply defects which a court, as such, has no power to remedy. The jurisdiction to do this, even under the statute of Elizabeth, is not in the court, but in the Chancellor, personally. 2 *Atk.* 553.

That a Court of Chancery may go so far as to enforce a trust, even for objects somewhat indefinite, in cases where the executor or person named, or holding the fund, was constituted by the will, trustee, or was in a situation to be treated as such by the court, may be conceded, without going the length necessary in

this case, and perhaps without departing from the general principles of a court of equity. And it is submitted that the strong weight of authority in the United States is against going any further. To this extent most of the following cases go, and no further, although some of the judges, in argument, may seem to sanction a stronger doctrine.

7 *Vermont Rep.* 241; 3 *Edw. R., King v. Woodhull*; 7 *Vesey* 86; 9 *Cow.* 437; 17 *Serg. and Rawle* 88; 5 *Harr. and John.* 392; 3 *Peters U. S. R.* 99, 484; 4 *Wheaton* 1; 3 *Leigh. Vir.* 450; 1 *Hawke N. C.* 276; 9 *Ohio* 203; 6 *Paige* 649; and see 4 *Kent Com.* 507, note (5th edit.) where most of the above cases are referred to, and 2 *Story Eq.*, §§ 1169, 1176, &c.; 1 *Bad. and Dev. N. C.* 276.

Some support for going further seems to be claimed from facts, as to the ancient practice of the English Chancery, said to be disclosed by the records lately published in England, as referred to in the case of Girard's will. 2 *Howard U. S. R.* 127, 155, 164, 191, 197, &c.

But it is submitted that such authority, so vague and uncertain in itself, derived from such ancient times, so long disused in Great Britain, never acted on in New Jersey, is not sufficient to introduce such sweeping conclusions. The maxim that a good judge will seek to enlarge his authority, although flattering to the court, and often acted upon by good judges, is exceedingly dangerous, and is emphatically to be repudiated under a government so strictly limited, and under a system so justly jealous of power as ours. The question is, Shall such powers be now for the first time assumed in New Jersey, where, if necessary, the legislature may so easily apply the remedy? That so long a time has elapsed without having done it, is, certainly, a strong reason for believing that such powers have not been thought expedient, or at least that they are not very necessary.

The right thus to *make a will* for a testator, and to deprive heirs of their legal rights, has been exercised to the extent now claimed only in cases of *charity*; and this has been done because it has been supposed that there are peculiarly strong motives for upholding such bequests. But this is more than questionable. It is believed that much stronger reasons may be ur-

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ged for absolutely prohibiting any disposition of land or of funds to charities, than for fostering and encouraging them. Who that has had only a passing knowledge of the gross abuses to which they have been subject in Great Britain, can help distrusting the policy of such a system? As is remarked by the pious and excellent Jay, (*Evg. Exercise*, Aug. 22d.)—

“Some leave large sums when they die; they had better be their own executors, and see and enjoy the application of their own liberality. The endowments bequeathed by many of our good forefathers have operated rather injuriously than otherwise—retaining the support of error in some places of worship, and relaxing the zeal and generosity of congregations in others; for people have an amazing keenness in perceiving when their assistance is not wanting.”

In regard to the question whether, if this bequest fails, the money will belong to the remainder of the estate and be disposed of as that is, or whether it is to be considered as undisposed of, it is submitted to the court, by the parties in interest, without argument.

The following are some of the cases applicable to this question.

4 *Ves.* 732; 4 *Paige* 117; 16 *Ves.* 451; 3 *P. Wms.* 40; 2 *Jac. and Walk.* 404; 1 *Hill Ch. R. S. C.* 95; 2 *Roper on Legacies* 341, 453–7.

It is taken for granted that, whatever be the decree, the cost on both sides will be taken out of the fund.

THE CHANCELLOR delivered an opinion, orally, declaring the bequest good as a trust to be executed. That the only difficulty was a mistake in naming the trustees; and that the court would appoint trustees.

Order accordingly.

MARK HEATHCOT v. JOSEPH RAVENSCROFT.

Bill for dissolution of a partnership and injunction and receiver, on which a receiver was appointed.

The bill stated, that on the 16th November, 1845, the complainant and defendant agreed, by parol, to enter into partnership in the business of manufacturing cotton; and agreed to contribute equally in money or necessary articles of machinery, towards forming a partnership stock for carrying on said business, and that the profits and losses should be shared by or fall equally on them. That in pursuance of said agreement, and for the purpose of providing themselves with a mill and water-power to carry on their said business, the complainant and defendant entered into a written contract with one John Cooper for the purchase of certain real estate in the county of Bergen, with a water-power and cotton mill thereon, for \$1000, to be paid at a future day; and, on the same day, entered into possession of said premises, under said contract.

That the complainant contributed, in fulfillment of his part of said agreement, and towards forming a co-partnership, stock, in necessary articles of machinery or in money, \$562.77, and the said Ravenscroft contributed \$122.85, leaving a deficiency in the contribution of the said Ravenscroft of \$439 92, which deficiency the said Ravenscroft represented to the complainant that he had means of making up, under his control, and agreed to make up the same in a short time thereafter. That notwithstanding the said deficiency, the complainant, relying on the said representations and promise of said Ravenscroft to make up the same in a short time thereafter, entered with him upon the business of manufacturing cotton yarn under the co-partnership agreement above stated.

That the said Ravenscroft and the complainant continued to carry on the said partnership business until September 4th, 1846, at which time they stopped business, though no dissolution or said co-partnership took place; and that during all that time

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the said Ravenscroft neglected to make any further contribution to the said co-partnership stock, notwithstanding his said promise and undertaking and the frequent urgent requests of the complainant for him to do so.

That on or about November 4th, 1846, the said Ravenscroft, without the knowledge or consent of the complainant, and in violation of his said co-partnership agreement, and without any further contribution to the said co-partnership stock, sold and transferred to Joel M. Johnson, all his interest in the lot of land, mill and water privilege herein before mentioned, together with all his interest in all the machinery, gearing and fixtures in said mill, consisting of the following goods and chattels in said writing enumerated, to wit, &c. ; and did covenant and agree to and with the said Joel M. Johnson, that he was the true and lawful owner of one full undivided half of the said goods, chattels and privileges.

That about the time of the said sale, the said Johnson entered into the said mill, and has ever since that time continued in possession of the same and of all the gearing, machinery, stock and appurtenances herein before mentioned ; claiming a right so to do as the owner of one-half thereof by virtue of the said article of sale.

That there are in said mill, divers articles besides those enumerated in the said article of sale, appertaining to the machinery in said mill and necessary and useful in and about the business of manufacturing, amounting in the whole to the value of \$175, as nearly as the complainant can estimate the same ; to which the said Johnson also claims an equal right and title with the complainant, and which he also holds in possession as one-half owner thereof.

That there were co-partnership debts contracted by the complainant and the said Ravenscroft before the 4th day of September last past, and now remaining due and unpaid, to the amount of \$710.49.

That the said Ravenscroft, since his said sale to the said Johnson, hath refused to pay any portion of the said co-partnership debts, although applied to and particularly requested so to do ; and that the said Ravenscroft hath no visible or tangible prop-

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erty or effects out of which the proportion of said debts which ought to be paid by him could be levied and made; and that the said Ravenscroft is in insolvent circumstances.

That the said Joel M. Johnson, although claiming to be an equal joint owner with the complainant in the said co-partnership property, refuses to pay or discharge any of the said co-partnership debts, or to make good to the complainant the excess of his contribution to the said co-partnership stock over the contribution of the said Ravenscroft; and claims to hold the undivided half of the said property free and discharged from such debts and liabilities.

That neither the said Ravenscroft nor the said Johnson, at or before the time of the said sale and transfer between them, made known to the complainant the intention of the said Ravenscroft to sell, nor the said Johnson to purchase the interest so sold and purchased, nor did they or either of them apply to the complainant or obtain his assent to such sale; but that said sale and transfer were made without the complainant's knowledge and consent.

That he hath been informed and believes, and therefore charges it to be true, that the said Johnson, before or at the time of his said purchase, and before the payment by him of any money on account thereof, knew or had good cause to believe that the said Ravenscroft had not an equal interest with the complainant in the said partnership property, and that he knew or had good cause to believe that the said co-partners had debts at that time due and owing, for the payment of which the said co-partnership property and assets ought in law and in equity to be applied. And the bill charges that the said Ravenscroft, at the time of his agreement to make up the deficiency in his contribution as above stated, had not the means so to do under his control, and that his representations to the complainant on that subject were fraudulent and intended to mislead the complainant; and that the said sale by the said Ravenscroft to the said Johnson was fraudulent, and that the same was made with the intent to defraud the complainant in the premises.

That by reason of the premises the co-partnership business of the complainant and the said Ravenscroft is wholly broken up.

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and that the co-partnership property is suffering great damage and loss ; and that the said Johnson hath set up in said mill a machine for cutting shingles, which the complainant is informed and believes he has put in operation, thereby exposing the said mill and machinery to great hazard of loss by fire ; and, as the complainant is advised and believes, by increasing the risk, vitiated and avoided the insurance effected on the said mill and machinery in the name of the said Ravenscroft, and the complainant as co-partners as aforesaid.

That the said Johnson threatens to take exclusive possession and control of the said mill and machinery and appurtenances, and to put the same in operation on his own account and for his individual benefit, and thereby wholly exclude the complainant from the same.

That the said Johnson, though not to the knowledge or belief of the complainant insolvent, yet is possessed of slender means, and is not of sufficient responsibility to render it safe to leave the said machinery and premises in his charge and under his control ; and that in case of any serious loss or damage to said property, or in case of the fraudulent removal or conversion of the same, he would, as the complainant verily believes, be unable to respond in damages to the complainant.

The bill prays that the said sale by Ravenscroft to Johnson may be set aside, that the partnership may be dissolved, and that a receiver may be appointed to take charge of the partnership property, and collect and sell the same ; and that the proceeds thereof may be applied, under the direction of the court, to payment of the partnership debts ; and that so much of the surplus, if any remain, as may be necessary for that purpose, be paid to the complainant, to make good the deficiency of said Ravenscroft in his contribution to the partnership stock ; and that the residue, if any, may be paid into court, to be disposed of as may be deemed equitable ; and that said Ravenscroft and Johnson may be restrained from doing or suffering any damage or waste, &c.

On filing this bill an injunction was granted, pursuant to the prayer thereof.

Afterwards, on notice, a motion was made for the appointment of a receiver.

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Daniel Barkalow, for the motion.

Richard R. Paulinson, *contra*.

THE CHANCELLOR said he thought it was a plain case for a receiver.

Order accordingly.

JOSEPH C. WARE, AN INFANT, BY ISAAC JOHNSON (SECOND),
HIS NEXT FRIEND, v. RICHARD M. WARE.

1. A husband had, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They commenced cutting during the life of the wife, and her death happening soon after, continued cutting after her death. On bill filed by her infant heir-at-law, the cutting was enjoined. At the time of the service of the injunction, some trees were still standing on some of the lots, the timber on which had been sold. It was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question whether the husband should account for it, and also to inquire and report whether the interest of the infant required that the trees still standing on the said lots should be felled.

2. Ordinarily, account for waste done is only incidental to relief by injunction against further waste.

3. If timber on land of an infant reversioner is in danger of decay, the court may direct it to be cut.

On the 4th of June, 1844, Joseph C. Ware, an infant of ten months' old, by Isaac Johnson second, his next friend, exhibited his bill, stating that he is the grandson of Marmaduke Cook, late of Salem county, deceased, and the son of Mary Louisa, the daughter of his said deceased grandfather; that his grandfather died intestate, October 10th, 1817, seized and possessed of a large real estate in the counties of Salem and Gloucester, leaving two children, Joseph Cook and Mary Louisa Cook, the mother of the complainant, his heirs-at-law; that on the 4th of June, 1842, the said Mary Louisa intermarried with Richard M. Ware, the de-

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defendant, the complainant's father; that on the 4th of March, 1844, the said Mary Louisa died, leaving the complainant her only child and heir-at-law.

The bill then states that in August, 1843, on the application of the defendant to the surrogate-general, commissioners were appointed to divide the real estate of the said Marmaduke Cook between the said Joseph and Mary Louisa, and that seven several lots and tracts were thereupon set off by metes and bounds to the said Mary Louisa. The boundaries of the tracts are set out in the bill. One is situated in Salem, containing thirty acres; another in Salem, containing 18 acres. The other five tracts are situated in Gloucester; one containing 118 acres; another 268 acres; another 45 acres; another 5 10-100th acres; and another 68 acres. That the report of the commissioners was confirmed January 8th, 1844.

The bill states that the defendant, immediately after the said division was approved, commenced the commission of waste, spoil and destruction of the premises assigned to the complainant's mother; that the said premises are, for the most part, woodland, and that the value thereof consists, principally, in the wood and timber thereon; that the defendant hath cut down and destroyed large quantities of timber and wood, and continues to commit waste, spoil and destruction thereon, to the injury of the complainant's inheritance; that he had made a vendue of the timber standing on the premises, and had sold to divers persons large quantities of the said timber, and among others, to certain persons, naming eighteen persons who are made defendants, who have cut down large quantities of the wood and timber, and carried the same away, and threaten to continue to do so; that the said defendants have cut a large quantity of the wood and timber and hauled it to and upon adjoining lands, and that a large quantity of wood and timber cut by the defendants now lies upon the premises where it was cut; that the acts and doings of the defendants will, if continued, result in the total destruction of the estate of the complainant.

The bill prays an injunction against further waste, and against removing any wood or timber cut down and being on the premises, or any wood or timber which has been taken off the premises and is now on adjoining lands.

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An injunction was granted according to the prayer of the bill.

The joint and several answers of the defendants, except one purchaser named in the bill, has been put in. The defendants admit that the premises came into the possession of the defendant Richard M. Ware by marriage with his late wife, and are now held by him as tenant by the courtesy, his said wife having died leaving issue, the complainant.

They state that, when the said Richard came into possession of the premises, there was standing thereon a considerable quantity of old timber; much that was decayed and decaying and checking the growth of the younger trees; much that was injured and ruined by the worms, particularly the pine; and much exposed to destruction by fire, which frequently happens in the coaling regions. That a just and proper regard to the estate required that all that has been cut should be cut, sold and removed. That the defendant Richard was so advised by persons well acquainted with the premises, and, among others, by the said Isaac Johnson second, the next friend of the complainant in this suit. That the said Richard accordingly made sale of part of the timber growing on said tracts, and that said sales were made with a special regard to the benefit of the estate. That all the sales were made in the lifetime of the wife of the said Richard. That since her decease no timber has been sold. That it was important for the preservation of the timber cut that it should be removed and used. That there is considerable bark on some of the lots, which, if suffered to lie on the ground, will soon be worthless. That such is the situation of the lots which have been sold, some of them having but few trees standing, and these more or less injured by the fall of the surrounding timber, that a just regard to the interests of the estate and of the party legally entitled, requires that the timber sold should be cut, and the timber cut used.

The answer submits, that the defendant Ware, as tenant by the courtesy, under such circumstances, is entitled to the proceeds of the said sales; but that if it should be otherwise decreed, he is guardian of the complainant, and is willing and ready to account for the same as such guardian, under the direction of this court; and that he is further ready and willing to

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stipulate that no more sales shall be made. That the continuing the injunction will be detrimental to all parties.

In October, 1845, on motion of counsel for the defendants, and with the consent of the counsel for the complainant, the injunction was so modified as to permit the wood and timber that had been cut to be removed by the purchasers, the same being first appraised and valued by Joseph Nelson, Esq., of the county of Salem, the said appraisement to be filed in this cause, and the defendant Ware to account for the amount of it, if the court, on the hearing, shall be of opinion that he is liable to account.

The case was heard on the bill and answer.

William N. Jeffers, for the complainant.

Peter D. Vroom, for the defendants.

THE CHANCELLOR. The commissioners' report of the division was confirmed January 8th, 1844. The complainant's mother died March 4th, 1844. The bill was filed June 4th, 1844, and states that, immediately after the division was approved, the defendant Ware commenced cutting, and that he has cut down large quantities of timber and wood, and continues to commit waste, to the injury of the complainant's inheritance. That he made a vendue of the standing timber, and sold it, in lots, to different persons, who had cut down large quantities of the wood and timber, and carried the same away, and threaten to continue to do so. That the defendants have hauled a large quantity of the timber cut to and upon adjoining lands, and that a large quantity of the timber cut now lies on the premises where it was cut. The bill does not state when the vendue was made, nor whether the wood and timber now lying on the premises was cut before the mother died, or has been cut since.

The answer states that all the sales were made in the lifetime of the wife of the defendant Ware; and that such is the situation of the lots which have been sold, some of them having but few trees standing, and those more or less injured by the fall of the surrounding timber. That the interests of the estate, and of the party legally entitled, require that the timber sold be cut.

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It would seem, from the bill and answer, that the defendants commenced cutting before the wife of the defendant Ware died, and continued to cut after her death.

It is clear that the complainant, in the lifetime of his mother, who held the fee, could not have restrained his father from cutting. Is he, then, entitled to an account for what was cut in his mother's lifetime? Possibly a case might arise in which it would be just and equitable to direct such an account; but, ordinarily, account for waste done is only incidental to relief by injunction against further waste. 3 *Atk.* 262; 3 *Paige* 259; 1 *Story's Eq. Jur.*, § 518.

As to the timber that was cut after the death of the wife, it may be that an account will be ordered. As to the trees standing on lots that were sold, it may be to the interest of the infant's estate in the lands that they be felled; they may, from the causes stated in the answer, be going to decay. If from such, or any other cause, timber on an infant's land is in danger of decay, the court may direct it to be cut. It will be referred to a master, to ascertain and report how much of the timber now lying on the premises or adjoining lands was cut after the death of the wife, and whether the interest of the estate requires that the trees standing on the lots, the timber on which was sold, should be felled.

The consideration of all further equity is reserved till the coming in of the report.

Order accordingly.

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HANNAH LIPPINCOTT AND AQUILA S. RIDGEWAY, EXECUTORS AND TRUSTEES UNDER THE WILL OF HOPE COWPERTHWAITHE, DECEASED, v. CHARLES STOKES AND THOMAS BUDD, EXECUTORS OF HOPE HAINES, DECEASED.

1. H. C. bequeathed to W. L., since deceased, and A. S. R. and to the survivor of them, one-fourth part of her personal estate, in trust, to place the same at interest, and to pay the interest arising thereon, yearly, to H. H., so long as she shall live; and also, in trust, to pay to H. H. so much of the principal as she shall, from time to time, by writing under her hand, attested by two credible witnesses, require of the said trustees; and if she shall leave children living at her death, or descendants of such children, then that which shall remain undisposed of of the said one-fourth part, with its accumulated interest, shall belong to and vest in her children, to be paid to them at 21 years of age respectively, with further provisions in case she shall die without leaving children or descendants of children. H. H. died without leaving any child or any descendant of any child, and leaving a will by which, after giving a number of pecuniary legacies, she gives the residue of her estate, real and personal, to, &c.

2. One question decided in the cause was whether H. H. had withdrawn from the trust any of the fourth part bequeathed to her, in the mode directed by the will, or by any act which could be considered equivalent to it.

3. The court may aid a defective execution of a power, but will not supply the execution where none has been attempted or intended.

4. Where the circumstances are so equivocal as to leave the mind in doubt whether an execution of a power was at all intended, the court should not interpose. An intention to execute the power should clearly appear.

5. The executors of the will of H. H., having obtained possession of securities belonging to the trust fund, were ordered to restore them to the trustee.

6. The claim made by the bill under the words "accumulated interest" in the will was denied—the court holding the words to apply only to the interest remaining unpaid to H. H. at her death.

7. Where securities for money are made payable to two persons, the surviving payee or obligee is entitled to the custody of them and to collect the money on them; and the representatives of the deceased co-payee or co-obligee are not at liberty to take half of them, in amount, from his possession.

Hope Cowperthwaite, deceased, late of Mount Holly, in this state, died in March, 1820, having first duly made and published her last will and testament, and a codicil thereto, by which, after giving certain pecuniary legacies, she bequeathed her personal estate in four shares; each share to trustees for certain

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beneficiaries. She bequeaths one-fourth in trust for her sister, Rebecca Zilley. It is not necessary to state particularly the provisions of this trust.

She gives and bequeaths to her son, Wallace Lippincott, and her grandson, Aquila S. Ridgeway, and to the survivor of them, and to the executors, &c., of such survivor, one other equal fourth, in trust, to place the same at interest, and to pay the interest arising thereon, yearly, to her daughter, Hope Haines, as long as she shall live; and to pay Hope so much of the principal of the said fourth as she shall, from time to time, by writing under her hand attested by two credible witnesses, require of the said trustees; and on the death of Hope, leaving children at her death, what shall remain undisposed of of this fourth, with its accumulated interest, to go to the children; but if she should die not leaving any child or descendant of any child living at her death, then that the said trustees (Wallace Lippincott and Aquila S. Ridgeway) pay such part of this fourth as may remain undisposed of at the death of Hope Haines, with its accumulated interest, unto such of the brothers and sisters of Hope Haines, or their children, and in such proportions as the said Hope shall, by will, or writing in nature thereof, signed by her hand and attested by two credible witnesses, direct and appoint; the said Hope to have power to dispose of the same only among her brothers and sisters and their children; and on the death of Hope Haines, without leaving any child living at her death, or descendant of such child, and without any such appointment, then that the said trustees pay the same to the brothers and sisters of the said Hope Haines, in equal portions, the share of any sister that may be married to be paid to her trustee, for her separate use, free, &c.; the children of any deceased brother or sister to stand in the place of his, her or their parent, and to take that parent's share, equally between them, if more than one.

The will provides that the trustees and the survivor of them, and all trustee and trustees thereafter to be appointed, shall, from time to time, at the reasonable request, costs and damages of the said Hope Haines, for the better carrying on the trusts aforesaid, appoint one or more new trustee or trustees, (excepting any husband of the said Hope Haines,) who shall, from time

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to time, be nominated by the said Hope Haines, with like powers, &c.

The will gives another fourth to her son, Wallace Lippincott, and her said grandson, A. S. Ridgeway, and to the survivor of them, and the executors, &c., of the said survivor, in trust, to put the same at interest, and to pay all the interest arising therefrom, yearly, to her daughter, Hannah Lippincott, so long as she shall live, and also to pay Hannah so much of the principal as she shall, from time to time, by writing, &c., (as in the foregoing case,) require; and if Hannah should die without leaving any child, or descendant of such child, then the said trustees to pay such part of this fourth as may remain undisposed of at the time of her death, with its accumulated interest, unto such of the brothers and sisters of Hannah and their children, and in such proportions as Hannah shall (in the way provided in the case of Hope) direct and appoint, but only among her brothers and sisters and their children, with like provision as in case of Hope, if she, Hannah, makes no such appointment, and with like provision as to new trustees.

By the codicil, she appointed Aquila S. Ridgeway an executor of her will, in conjunction with Hannah Lippincott and Hope Haines.

Hope Cowperthwaite died in 1829. The three executors proved the will. Wallace Lippincott, the only co-trustee with Aquila S. Ridgeway of the fourth bequeathed in trust for Hope Haines and those connected with that trust, died in June, 1837, leaving Aquila S. Ridgeway sole trustee of that fourth. And, since the death of Hope Haines, the complainants, Hannah Lippincott and Aquila S. Ridgeway, are the surviving trustees of another fourth bequeathed in trust for Rebecca Zilley. And Hannah Lippincott and Aquila S. Ridgeway are also, since the death of Hope Haines, surviving executors of the will of Hope Cowperthwaite.

Hope Haines died in January, 1844, leaving a will, and appointing Charles Stokes and Thomas F. Budd, the defendants in this case, executors thereof, and trustees for certain purposes therein specified. This will gives \$2000 to the children of a niece; \$2000 to the children of another niece; \$120 a year to

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a nephew, during his life, and on his death the principal sum of \$2000 to be divided among his children and the children of any deceased child of his, and if he leave no child, or descendant of any, the said \$2000 to be divided, at his death, between his sisters and the children of his deceased brother; the said children taking one-third; \$2000 to a son of a deceased nephew; \$1000 each, to two daughters of a deceased nephew, and \$20 a year to their mother, during her life; the interest of \$400 a year to her sister, Rebecca Zilley, during her life, and at her death, the said interest to be paid to two daughters of the said Rebecca, during their lives, and after their deaths, to their children; (and carrying the trust provisions further, and authorizing her nieces to elect new trustees, not their husbands;) the interest of \$2000 a year to Aquila S. Ridgeway, (a nephew,) after the death of his present wife, if he should outlive her, and at his death, the said \$2000 to be divided among his children, (and providing for the children of any deceased child, and that if his present wife should outlive him, then, at his death, the said \$2000 to be divided among all her nieces and a nephew and the children of a deceased nephew.) The will then devises and bequeaths all the rest, residue and remainder of her estate, real and personal, to be equally divided between the child or children of Aquila S. Ridgeway and her sister, Rebecca Zilley.

This will is dated November 17th, 1841, and is executed under seal, in the presence of three witnesses.

Hope Haines left both real and personal estate of her own, unconnected with the trusts under the will of Hope Cowperthwaite; and her personal estate was more than sufficient to pay the legacies given by her will.

After the death of Hope Haines, the executors of her said will went to the house where she and her sister Hannah had resided, and where Aquila S. Ridgeway, until his marriage, had lived with them, and where Hannah Lippincott yet lived; and a box containing individual papers of Hope Haines, as well as the papers claimed by the bill to be trust papers, being shown to them, took an inventory and appraisal of what were admitted to be Hope Haines' separate, individual securities, and also inventoried and appraised as belonging to her estate, the

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one-half, in amount, of the securities claimed in the bill to belong to the trusts created by Hope Cowperthwaite's will, and took possession of and carried away securities claimed by the bill as belonging to the said trusts, to the amount of half, and somewhat more, of the whole amount of the said securities.

The bill is filed by Hannah Lippincott, Aquila S. Ridgeway and Rebecca Zilley, against Charles Stokes and Thomas F. Budd, personally, and against them as the executors of the last will and testament of Hope Haines, deceased; and prays that they may render an account of all the securities taken by them belonging to the trusts created by Hope Cowperthwaite's will; and that an account may be taken, under the direction of the court, of the whole of the said trust funds which were in the hands of Hope Haines, with the accumulated interest thereon; and that they may be decreed to pay over to the complainants, Hannah and Aquila, the amount in their hands found to be due from the estate of Hope Haines to the said trust estate, and to deliver to them, Hannah and Aquila, as trustees under the will of Hope Cowperthwaite, all securities for money taken by the defendants which may be found to belong to the said trust estate and to the complainants, Hannah and Aquila, as trustees as aforesaid, or either of them; and to pay over to the said Hannah and Aquila all moneys received by the defendants on the securities belonging to the said trust estate, with interest thereon; and that the several trusts created by the will of Hope Cowperthwaite may be established; and that the complainants, Hannah and Aquila, may be declared to be the trustees and trustee of the respective parts of the said trust funds, according to the provisions of the will of Hope Cowperthwaite, and according to their respective rights in the premises.

In addition to the foregoing facts, the bill states that Hope Haines had the control and direction of the business and money affairs, as well of the family, as of the estate of the testatrix, Hope Cowperthwaite. That on the 25th June, 1839, it was ascertained that the personal estate of Hope Cowperthwaite, deceased, bequeathed in trust, amounted to \$58,954; that by a statement in the handwriting of Hope Haines, it appears that on that day there was, of the said trust funds, remaining in the

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hands of the said trustees, \$48,754.80, consisting of securities for money ; that there had been paid to the complainant, Rebecca Zilley, on account of her portion of the said trust estate, \$2433, and that on that day there was allotted to her securities, amounting, with the interest thereon, to \$12,255, as and for her portion of the said trust estate ; and that there was then allotted to the said Hope Haines, and the complainant Hannah Lippincott, out of the said trust funds, securities amounting, with the interest due thereon, to \$29,429.80, as and for their portions of the said trust estate, the share of each amounting to \$14,714.90 ; and that, on the same day, there was allotted to the complainant Aquila S. Ridgeway, out of the said trust funds, bonds and mortgages, amounting, with the interest thereon, to \$7700, as and for his portion of the said trust estate ; it being a part of the portion bequeathed in trust for his mother, Martha Woolston, the residue of the said portion having been paid over to the complainant Aquila, absolutely, in pursuance of the direction of the codicil to the will of Hope Cowperthwaite. The bill charges that on the said June 25th, 1839, the said sum of \$48,754.80 was in the hands of the said Hope Haines, and of the surviving trustees of the will of Hope Cowperthwaite, for the purposes of the trusts thereby created. That Hope Haines did not, by writing under her hand, attested by two credible witnesses, require of the said Wallace Lippincott, and the complainant Aquila, trustees as aforesaid, or of the survivor of them, any of the principal money of the fourth part so bequeathed in trust for her, but that the whole of the said principal money continued as a part of the trust fund up to the death of the said Hope Haines, and still of right continues part thereof. That no part of the share of the said Martha, or of the share of the said Rebecca, or of the share of the said Hannah, (except as to so much of the shares of Martha and Rebecca as have been paid as aforesaid,) has ever, by writing under the hand of the said *cestuis que trust*, respectively, or either of them, attested by two witnesses, been demanded of the trustees of the said several legacies, or of the survivors or survivor of them ; but that the whole of the said legacies, except as before excepted, still remain part of the trust fund.

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The complainant Hannah charges that the trust as to her fourth was never destroyed, or determined, nor intended so to be, but that she considers the said trust as still subsisting, and that the said Hope Haines, as she always understood and believed, as well from the declarations as from the actions of the said Hope Haines, always considered and wished it to be understood as to her, the said Hope Haines' share, that the trust in relation thereto was subsisting at her death, and that it should continue; and that the said Hope Haines repeatedly expressed an anxious desire and settled purpose, on her part, that the trusts as to the whole of the said trust funds should be continued and in no wise impaired.

The complainant Hannah further charges that neither Hope Haines nor she, the said Hannah, ever executed any writing changing or determining the said trusts, as to their respective shares, or withdrawing from the said trusts any part of the principal of the trust funds. The bill states that from the time of the death of Hope Cowperthwaite, Hope Haines and the complainant Hannah Lippincott, as executrices of the said will, had the management of the estate of Hope Cowperthwaite, deceased, and the possession and control of the trust funds belonging thereto, and that on the 25th June, 1839, after the duties of the executors touching the said estate had been discharged, and after the trust funds had passed into the hands of the trustees, the said Hope Haines, having great confidence in her own management of money affairs, and an excessive love of money and of power, insisted on retaining the whole of the trust funds in her own hands and under her own control; and that the complainants Hannah and Rebecca yielded to her solicitations, and the complainant Aquila having had difficulties with the said Hope Haines, in regard to the disbursement of his own funds by her, as one of the executors of the will of Hope Cowperthwaite, and being desirous of avoiding all altercations with her, also consented to her wishes; and that it was accordingly agreed by and between Hope Haines and the complainants Hannah and Aquila, that the complainant Aquila should forbear to act as trustee, and that the whole trust funds to which Hope Haines and the complainant Hannah were, respectively, entitled, and of which the

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complainant Aquila was the sole surviving trustee, should remain in the hands of the said Hope Haines and the complainant Hannah, respectively. That the said Hope Haines and the complainant Hannah did, by writing under their hands and seals, dated the said June 25th, 1839, declare that the complainant Aquila was to remain the trustee of the said Hope Haines and the complainant Hannah, and did thereby exonerate him, (so far as they were personally concerned,) from all liability which he might incur from permitting the said portions, with the evidences and securities thereof, to remain in their hands and under their control. That in pursuance of the said arrangement, and at the special solicitation of the said Hope Haines, the complainant Aquila, surviving trustee as aforesaid, did permit the whole of the funds so bequeathed in trust for the said Hope Haines and the complainant Hannah to remain in their hands, and that they did, until the death of the said Hope Haines, remain in their hands without being divided between them, the said Hope and Hannah. That on the said June 25th, 1839, it was further agreed by and between the said Hope Haines, the complainants Hannah and Rebecca and the complainant Aquila, that the portion bequeathed in trust for said Rebecca should remain in the hands of the said Hope Haines and the complainant Hannah, with the securities thereto belonging, under their management and control, without any interference of the complainant Aquila, though he was to remain a trustee for the said Rebecca; and that the complainant Rebecca, by writing under her hand and seal, dated the same June 25th, 1839, did, so far as she was personally concerned, release the complainant Aquila from all liability for permitting the said trust funds and the securities therefor to remain in the hands of the said Hope and Hannah, and under their control; and that the complainant Aquila, one of the trustees of the said Rebecca, did, in pursuance of the said arrangement, and at the special solicitation of the said Hope Haines, permit the said fund so bequeathed in trust for the said Rebecca, with the securities therefor, to remain in the hands of the said Hope and Hannah; and that the same, ever after, until the death of the said Hope, did remain in their hands and subject to their management and control.

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The bill states that the said Aquila has never renounced the trusts so confided to him; that at the time of the agreements aforesaid, it was distinctly understood and agreed that the complainant Aquila should remain a trustee of the said trust funds; and that the complainant Aquila has always continued and still is a co-trustee, with the complainant Hannah, of the share of the said Rebecca, and the sole surviving trustee of the shares of the said Hope Haines and the complainant Hannah; and that he still remains liable, as trustee, for the faithful execution of the said trusts, except in so far forth as he was discharged from liability by the releases aforesaid.

The complainants Hannah and Rebecca say that, by reason of the age and infirmity of the complainant Hannah, she is becoming inadequate to the sole management of the said trust funds, and that they are desirous that the complainant Aquila should assume the management of the funds bequeathed in trust for them, respectively.

The complainant Hannah says that, after the said June 25th, 1839, the whole of the said trust funds so left in the hands of the said Hope Haines and her, the said Hannah, together with the share of the said trust funds belonging to the complainant Aquila, with the securities therefor, remained in the hands and under the management and control of the said Hope Haines and the complainant Hannah until the death of the said Hope, the accounts thereof being kept solely by the said Hope.

The bill states that, by a statement in the handwriting of the said Hope Haines, dated June 25th, 1843, now in the possession of the complainant Hannah, it appears that there was then in the hands of the said Hope Haines and the complainant Hannah securities for the payment of money, belonging to the said trust funds, amounting to \$61,347.37; and the complainants believe that the said writing contains a true enumeration of the securities belonging to the said trust estate, and the amount thereof on that day, and that the whole of the said sum, with the accumulated interest thereof, belongs to the said trust estate.

That Hope Haines died in January, 1844, leaving a will, dated November 17th, 1841, of which she appointed the defendants Charles Stokes and Thomas F. Budd, executors, therein and

thereby also appointing them trustees for certain purposes therein specified.

The bill charges that the said Hope Haines did not, by her will, make any direction or appointment, as authorized to do by the will of Hope Cowperthwaite, deceased, of the part of the fourth part of the personal estate of the said Hope Cowperthwaite, deceased, so bequeathed in trust for the said Hope Haines, remaining undisposed of, with its accumulated interest, at the death of the said Hope Haines, or of any part thereof; but that said Hope Haines died not leaving any child living at her death, nor descendant of such child, and without having made such appointment as aforesaid; and that the whole of the said Hope Haines' share, with its accumulated interest, remains subject to the said trusts created by the will of Hope Cowperthwaite, and for the due performance of which the complainant, Aquila, as the sole surviving trustee, is alone responsible.

The bill states that Hope Haines died possessed of a large personal estate in her own right, independent of the said trust funds, more than sufficient, as the complainants are informed and believe, to pay all her debts and all the legacies bequeathed by her will. That the said Charles Stokes and Thomas F. Budd, on or about March 5th, 1844, under pretence of making an inventory and appraisement of the goods, chattels and credits which were of the said Hope Haines, deceased, as executors of her will, caused to be inventoried and appraised a large number of securities for money, amounting, as the complainants have been informed and believe and charge the truth to be, to \$56,991.17; that the said Stokes and Budd, under pretence that the said securities were jointly owned by the said Hope Haines and the complainant Hannah in their own rights, caused one-half of the amount then due on the said securities to be appraised as the personal property of the said Hope Haines; whereas the complainants charge, and they say that it so appears on many of the said vouchers, that the securities so inventoried and appraised were and are a part of the said trust estate; and that the complainants Hannah and Aquila, or one of them, as trustees as aforesaid, or (as to the securities standing in the name of Hope Cowperthwaite, deceased,) as surviving executors of the will of

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Hope Cowperthwaite, or (as to the securities given or assigned to the said Hope Haines and Hannah Lippincott jointly) the complainant Hannah, as surviving payee, are or is entitled to have and hold each and every of the said securities so inventoried and appraised by the said Charles Stokes and Thomas F. Budd.

The bill states that Stokes and Budd, among the securities so inventoried by them, included not only the securities in which the said Hope Haines, in her lifetime, was interested as *cestui que trust*, but also a large number of securities which were in her hands as one of the trustees under the will of Hope Cowperthwaite, deceased, partly in trust for the complainant Rebecca, and partly in trust for the complainant Aquila, and which, on the death of Hope Haines, belonged to the surviving trustees under the will of Hope Cowperthwaite, and in which the said Hope Haines never had any beneficial interest. That a part of the securities so inventoried by Stokes and Budd were given to the said Hope Cowperthwaite, deceased, in her lifetime, and are still standing in her name, which securities can be collected only by the complainants Hannah and Aquila as surviving executors of the will of Hope Cowperthwaite, who alone can give a discharge for the money, or acknowledge satisfaction on record of the mortgages. That Stokes and Budd, not satisfied with making an inventory of the said bonds, mortgages, and other securities, under pretence of making a division thereof between the estate of Hope Haines and the complainant Hannah, on or about May 5th, 1844, against the remonstrances of the complainants Hannah and Aquila, took into their possession, out of the custody and possession of the complainants Hannah and Aquila, the following bonds, mortgages, and securities belonging to the trust estate under the will of Hope Cowperthwaite, that is to say, (specifying them particularly,) amounting, in all, to \$28,651.

The bill states that, on the 9th May, 1844, the complainants Hannah and Aquila, by their duly authorized attorney, demanded of Stokes and Budd the bonds, mortgages, and other securities so taken by them, and demanded that they should be restored to them, the complainants; but that the said Stokes and

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Budd refused to deliver the same to them, the said complainants, or to their attorney, and still unlawfully detain the same from the said complainants Hannah and Aquila; that the said Stokes and Budd have collected money on the said securities, and are still, as the complainants are informed and believe, proceeding to collect money thereon, and to dispose of said securities, against the will of the said complainants Hannah and Aquila; that the said Stokes and Budd, executors as aforesaid, under pretence of making an inventory and appraisement of the goods, chattels and credits which were of Hope Haines, deceased, on or about May 5th, 1844, caused to be inventoried and appraised, and took into their possession, as the sole property of the said Hope Haines, a bond and mortgage made by William Warner, Jr., to the said Hope Haines, dated 3d month 25th, 1842, for \$4547.20, on which a large arrear of interest had accrued; and that the said Stokes and Budd still retain possession thereof, or have disposed of it, without the permission and against the will of the complainants, Hannah and Aquila, which last-mentioned bond and mortgage, the bill charges, belong to the complainants, Hannah and Aquila, trustees as aforesaid, under the will of Hope Cowperthwaite.

The defendants put in their joint and several answer, in which, after admitting the will of Hope Cowperthwaite, deceased, and the codicil thereto, as stated in the bill, they say that, as to the allegation in the bill, that on the 25th of June, 1839, it was ascertained that the personal estate of Hope Cowperthwaite, deceased, bequeathed in trust as aforesaid, amounted to \$58,954, they have no personal knowledge; and that the papers and writings of Hope Haines, which might and probably would throw light on the matter, have been taken, and are withheld from them, as in their answer is afterwards stated; that as to the statement in the handwriting of Hope Haines, which the complainants allege is in their possession, they have no such knowledge as will enable them to answer whether the contents thereof are truly set forth, or whether the whole of its contents have been set forth in the bill; that they have reason to believe, that at or about the time for that purpose mentioned in the bill, some statement was made in regard to the rights and interests of the

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complainants and the said Hope Haines, under the will of Hope Cowperthwaite, deceased; that the amounts severally due Rebecca Zilley and Aquila S. Ridgeway, after deducting what had been paid to each of them, was then ascertained; that Aquila assigned over to Hope Haines and Hannah Lippincott all his right and interest in the bonds and securities which had been given to them as executors, or to which, as executors, they were entitled, and in which the said Aquila appeared to have any legal interest, with some few exceptions; that the said Hope and Hannah thereupon took or retained possession of the whole of said bonds and securities; that at the same time, as these defendants have understood, Hope Haines and Hannah Lippincott executed and gave to the said Rebecca and Aquila some obligation or writing or writings, by which they became bound to Rebecca and Aquila to the amount of their shares, respectively, as then ascertained, but who thereupon became legally or equitably entitled to the said securities, the defendants submit to the judgment of the court; that from the papers they saw and the assignments thereon, and other information, they are induced to believe, that from the time of such ascertainment, Hope Haines and Hannah Lippincott took possession of their several shares under the will of Hope Cowperthwaite, as their own individual and separate property, for their common benefit; that up to that period, bonds and securities were taken, and the business conducted in the names of Hope Haines and Hannah Lippincott, as individuals.

They say that, after the time when the said shares were ascertained as aforesaid, as these defendants have understood, and after the assignment of the bonds and securities by the said Aquila to the said Hope Haines and Hannah Lippincott, the said Aquila did not, in any wise, act as trustee; and whether he considered himself still as trustee, and liable as such, or whether he actually continued to be such trustee, in law or in fact, they cannot answer.

They say they are not informed, or able to answer, whether Hope Haines did or did not, at any time, require of the said Wallace Lippincott and Aquila S. Ridgeway, or the survivor of them, in the mode provided in the will of Hope Cowperthwaite, any

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part of the principal of the fourth of the personal estate of Hope Cowperthwaite; nor whether the whole of the said principal money continued as a part of the said trust fund up to the death of Hope Haines, and still of right, so continues. That they were under the impression and belief, when they qualified as executors of the will of Hope Haines, that the principal of the said one-fourth part had in some way become the absolute property of the said Hope Haines, and that she so considered it in her lifetime, and that the same was so considered and understood by the complainants; but whether the said principal has in fact and in law become the property of the said Hope Haines, or whether it remains a trust fund, they submit to the determination and direction of the court. They say they have understood and believe that, after the death of Hope Cowperthwaite, Hope Haines and Hannah Lippincott, as executors of her will, had the management of the estate and the possession and control of the funds belonging thereto; but whether, after the duties of the executors were discharged, the said Hope Haines insisted on retaining the whole of the trust funds in her hands, and under her own control, they are unable to answer; nor can they answer how far or on what consideration the complainants yielded to such insistment; nor whether it was agreed that the whole of the trust fund to which Hope Haines and Hannah Lippincott were respectively entitled should remain in the hands of the said Hope Haines and Hannah Lippincott; nor whether the said Hope Haines and Hannah Lippincott, at the time in that behalf mentioned in the bill, did, by writing under their hands and seals, declare that Aquila was to remain the trustee of the said Hope Haines and Hannah Lippincott, and did exonerate the said Aquila from all liability by reason thereof, so far as they were personally concerned; nor whether, in pursuance of the said arrangement and at the special solicitation of the said Hope Haines, the said Aquila permitted the whole of the said trust fund bequeathed for the benefit of the said Hope and Hannah to remain in their hands; but they believe that the amount of their said shares was, at the death of Hope Haines and for several years after had been in the hands of Hope Haines and Hannah Lippincott; that money was loaned and securities taken therefor in

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their own individual names, and that the whole business in relation thereto was managed and conducted without reference to any trust whatever. That, though it may be, as stated in the bill, that no actual separation or division of the said fund, or the securities belonging to it, ever took place between Hope Haines and Hannah Lippincott, yet the defendants believe that the said Hope Haines, who was the principal accountant, did, from time to time, make out a statement of the funds in the possession of herself and Hannah; and, after giving credit, or deducting such amount as they might be liable for to Aquila and Rebecca, or as would be sufficient to meet the obligations or engagements so given and made to them as aforesaid, the balance remaining was divided into two equal parts, and one part designated as belonging to the said Hannah Lippincott, and the other as belonging to the said Hope Haines.

They say it may be true, as stated in the bill, that it was further agreed, at the time aforesaid, by and between Hope Haines and the complainants, that the portion of the trust funds belonging to Rebecca should remain in the hands of Hope Haines and Hannah Lippincott, to be managed by them, without any interference on the part of Aquila, the still remaining trustee; and that Rebecca did release Aquila from all liability by reason thereof; and that, in consequence thereof, Aquila permitted the said fund so to remain; but they say they have no knowledge of the said agreement, and can neither admit or deny it.

They say they have understood, however, and did suppose and believe, that when the portions due Aquila and Hannah were ascertained, or the securities constituting the same were left in the hands of the said Hope and Hannah, they, the said Hope and Hannah, by their own individual obligations or other writings, became personally responsible to the said Aquila and Hannah, severally, for their respective shares, and that thus being equitably entitled to the securities constituting said shares, they took the same as their own, and managed the whole as one common fund; especially as most of said securities were actually assigned over by Aquila to the said Hope and Hannah.

They admit that Hope Haines did not, by her will, make any direction or appointment of the fourth part of the residue of the

personal estate of Hope Cowperthwaite, as such residue as authorized to do by the will of Hope Cowperthwaite; but whether in the will of Hope Haines any such appointment or direction has been made as is authorized by the will of Hope Cowperthwaite, or whether the whole of the said Hope Haines' share, with its accumulated interest, or any part thereof, remains subject to the trust created by Hope Cowperthwaite's will, they submit to the decree and direction of the court.

They admit that Hope Haines died possessed of a valuable personal estate, independent of the trust fund bequeathed by Hope Cowperthwaite, and they have supposed that her personal estate, exclusive of her said trust fund, would be sufficient to pay her debts and the legacies bequeathed by the will, and leave a surplus for the residuary legatees; but that they are now under the impression that if the claims made in the complainants' bill are all allowed, and the one-fourth, with the accumulated interest thereon, be decreed to be a trust fund to be applied according to the will of Hope Cowperthwaite, there will not be sufficient to pay the debts, expenses and pecuniary legacies, and that the residuary bequests will remain entirely unprovided for.

They admit that on or about March 5th, 1844, they, as such executors, caused to be inventoried and appraised what they considered and believed to be the goods, chattels and credits of Hope Haines, deceased; that in the said inventory are included—

First, the bonds, notes and other securities payable to the said Hope Haines, or assigned to her, and which they believed to be her own separate property, amounting to \$21,443.30.

Secondly, certain bonds, notes and other securities payable to Hope Haines and Hannah Lippincott, or standing in their names, amounting to \$15,616.26, which said bonds, notes and other securities being payable to or assigned over to the said Hope and Hannah, the defendants charged themselves in the said inventory with half the amount of each security, as the property of the estate of Hope Haines.

Thirdly, certain other bonds, notes and securities, some of which were originally payable to Hope Cowperthwaite, in her lifetime, and others of which were payable to the executors of.

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her will, after her death, and others of which were assigned over to the said executors.

These securities being found with the other securities of the said Hope Haines, deceased, and almost all of them having been assigned over to the said Hope Haines and Hannah Lippincott by the said Aquila, either as executor of or as trustee under the will of Hope Cowperthwaite, and the said Aquila representing, at the time of taking said inventory and appraisement, that the bonds which had no such assignment on them were in that condition only because he had omitted to make the necessary and proper assignment thereon, and that he claimed no property or interest therein, as he held an obligation against the said Hope Haines and Hannah Lippincott for his interest in the estate, these defendants, under the impression and belief that there had been some settlement made between and among the persons interested in the personal estate of Hope Cowperthwaite, deceased, and that Hope Haines and Hannah Lippincott had given to Aquila and Rebecca their individual obligations for the amounts due them, severally, and were therefore personally responsible therefor, and that the said bonds, notes and other securities so given and assigned, and so found as aforesaid, were the individual property of the said Hope Haines and Hannah Lippincott, and that the estate of the said Hope Haines had an equal interest therein, charged themselves in the said inventory with one-half aforesaid; that in so doing they acted in good faith and according to the best of their judgment, from the facts and circumstances before them and within their knowledge; that the whole amount of the securities last mentioned was, at the time of taking said inventory, \$41,375, and that they charged themselves with the half thereof.

That at the time of taking said appraisement and inventory, Aquila made no claim to the bonds or to any part thereof, either as executor, or as trustee, or in any other capacity, nor did he represent himself to these defendants as a trustee, or as having any interest in the said property, either as trustee, or *cestui que trust*; that there was nothing in the said bonds or securities, or any of them, to show the defendants that Aquila or Rebecca had any interest in them, except that one of said bonds, originally

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given for \$1000, was made payable to Hope Haines and Hannah Lippincott, trustees of Rebecca Zilley, and one other, for \$270, was drawn payable to them as trustees generally.

They admit they took into their possession, among others, the several bonds and mortgages specified in the bill; but do not admit that the said securities are part of a trust fund, nor can they answer as to their character further than they have answered.

They deny that they were taken out of the custody of Hannah Lippincott and Aquila S. Ridgeway against their will and remonstrance, as is alleged in the bill; and allege the truth to be that, after some conversation between them, the defendants, and Aquila and Hannah, in regard to the disposition of the said bonds and mortgages, it was eventually agreed that one-half, in amount, of all the bonds and securities, (excepting those payable to or standing in the name of Hope Haines alone,) should be retained by the defendants as executors as aforesaid, and that the other half should be given up and delivered over to Hannah Lippincott, which was accordingly done by these defendants; and the same were taken and received by the said Hannah; and each party gave to the other a list of the bonds and securities so taken and received.

They say that the said bonds and securities were not in the possession of the said Hannah and Aquila, or either of them, but in the custody of these defendants; that they were in the same chest in which were found the other bonds and papers of Hope Haines; which chest was delivered to them, as executors of her will, together with the key of it; that after taking the inventory, they took with them the bonds and securities belonging to the estate of Hope Haines, deceased, and retained possession of the key, (leaving the chest at the late residence of the said Hope Haines, in which chest were many papers appertaining to the estate and business of Hope Haines, deceased, which had not been carefully examined,) until the key was, at the request of Ab. Brown and John R. Slack, Esquires, delivered to them, in confidence, that they might examine the papers and other writings remaining in the chest, for the purpose of arriving at some conclusion or getting some information as to

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the trust or trusts set up in the bill and the management of the said property by the said Hope Haines, or by the said Hope Haines and Hannah Lippincott.

They say that the key was delivered to Brown and Slack as the agents or friends of the complainants, or some of them, as they understood, in the full belief that it would be returned to them; but that it has never been returned, and that the key, with the chest and the papers therein have ever since been withheld from them, though they have demanded them, considering that they were entitled to them, and that they might be aided by them in the proper understanding and prosecution of their rights and duties as such executors; and they say they suppose and believe, that the statements, papers and agreements, or some of them, specified in the stating part of the complainant's bill, were found in the said chest; and they hope that the fact that they have had no opportunity carefully to examine these papers will satisfactorily account for the imperfect answers they have been obliged to give to various parts of the bill.

They admit that Abraham Brown, about the time in that respect stated in the bill, demanded of them the bonds or obligations in their hands, and that they declined surrendering them either to him or to the said Aquila and Hannah; but say they have repeatedly offered to the complainants, or some of them, to surrender up to Rebecca and Aquila obligations, or pay over to them money, equivalent in amount to the obligations or agreements by them held against the said Hope Haines or her estate, whenever the said Aquila and Rebecca would deliver up to the defendants the said agreements or obligations; and that they are still willing to do so.

They admit they received moneys on some of the securities; but say they have not, in any instance, solicited payment, being desirous that the moneys should remain as invested so long as any question was made as to its appropriation or ownership; and that most of the money they have received has been deposited in bank for safe keeping, the residue having been placed at interest.

They admit that they inventoried and took possession of, as the separate property of Hope Haines, the bond and mortgage given by William Warner, Jr., to Hope Haines, dated 3d month

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25th, 1842, for \$4500, stated in the bill, as they supposed they had an undoubted right to do ; but deny that they did so against the will of Aquila and Hannah, or either of them, as far as they know ; and they deny that at the time of the filing of the bill they had disposed of the said bond and mortgage ; but they allege that after the bill was filed, Warner proffered himself ready and desirous to pay off the said bond and mortgage, and that the defendants, finding that it was claimed in the bill as trust property, and denied to be the separate property of Hope Haines, declined, on that account, to receive the money ; whereupon Warner tendered the money in specie, and that the defendants, not feeling at liberty to refuse it, received the money and deposited it in bank for safe keeping ; and they deny that the said bond and mortgage is a part of the trust fund, or in any way connected with it, so far as they have any knowledge.

They say they are willing to render a true account of all the securities which came to their hands as executors aforesaid, and that the inventory, a copy of which is annexed to their answer, contains such account, as they verily believe.

They say they have always been and still are ready and willing to pay over or deliver to Aquila and Hannah any money, securities or other property in their hands, as soon as it may be ascertained that the same belongs to the said Hannah and Aquila, or either of them, or that they are entitled to the custody of the same, as trustees or otherwise, and they, the defendants, be indemnified and made safe in so doing ; that they are desirous to act under the direction of the court, and to have the benefit of its protection ; the more especially as those who claim under the residuary bequest in the will of Hope Haines, or some of them, allege and insist that the whole of the fourth part of the estate of Hope Cowperthwaite, which was given in trust for the benefit of Hope Haines, became, according to the requirements of the trust, or in some other way, in the lifetime of said Hope Haines, the separate and sole property of the said Hope Haines ; that the same was withdrawn from the trust fund, and that it now constitutes a part of the estate of said Hope Haines ; and particularly, they insist that the interest on said share, the said share being in the actual possession of the said Hope Haines,

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in her lifetime, and the interest received by her, constitutes a part of the separate estate of said Hope Haines, even if it should be ascertained that the share itself is trust property.

They further say that according to the terms of the trust in Hope Cowperthwaite's will, the interest on the share given for the benefit of Hope Haines, and the other *cestuis que trust*, was payable annually; that they have understood and believe, that in the lifetime of Hope Haines, she paid the interest annually to Aquila and Rebecca on the account for which they held the obligations of the said Hope Haines and Hannah Lippincott; that as to the interest annually and accruing and received by the said Hope Haines, on her share of the said fund, they are unable to say when the same was invested, or in what securities; and whether, if a trust be established, and the said share be decreed to be held in trust for the purposes of Hope Cowperthwaite's will, the said interest, or any part of it, shall be considered as belonging to said trust, they submit to the court, and say they are ready to abide its decision and indemnity. But they submit that they are not responsible for any loss that may accrue, in case the trust be established; that they have acted in good faith, on the facts and information before them, and on the advice of counsel, and thrown no obstacle in the way of a speedy decision and adjustment of the rights and claims of all who may be interested.

And they further say that the complainants, having withheld from them the papers, which they, the complainants, now insist establish the trust and their right to the said bonds and securities, or a part thereof, have no just grounds of complaint against them.

They further say that Hope Haines never, as they believe, received any commission or other compensation for her services as one of the executors of Hope Cowperthwaite's will; and submit that her estate is entitled to a proper allowance for the same, and for any services rendered to the complainants in and about the management of the property.

A copy of the inventory and appraisement caused by them to be made of the property inventoried as the property of Hope Haines, is annexed to this answer.

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Interrogatories were exhibited by the defendants to the complainants.

In answer thereto, Rebecca Zilley says that she received from the executors of her mother's will, on account of her share, prior to 1839, \$2483. The money was handed to her by Hope Haines, the acting executor. This is all she has received.

Aquila, in answer to the said interrogatories, says he received of the residuum of the estate of Hope Cowperthwaite, from Hannah Lippincott and Hope Haines, executors of and trustees under the will of Hope Cowperthwaite, prior to June 25th, 1839, in different sums, at different times, \$5938; that though Hope Haines was, on that occasion, the acting person, the business was done in the names of both his trustees, Hope and Hannah. The securities he received were assigned to him by both of them. That on the 25th June, 1839, he received the further amount of \$1781.73. These sums were in full of what was bequeathed to him absolutely. On that day an instrument of that date, executed by Hope Haines and Hannah Lippincott, was delivered to him, a copy of which is annexed to these answers.

Rebecca says an instrument was given to her, a copy of which is annexed to the answers.

Aquila answers, further, that there are papers in the box, relating to the trust funds, consisting of memoranda and accounts, some in his handwriting, but most in Hope Haines' writing. There are also in the box some accounts, &c., which appear to relate to the separate estate of Hope Haines; these he offered to Mr. Stokes, but he declined to receive them. As to those which relate to the trust fund, he caused an offer to be made to Stokes to produce them in the presence of the complainants and defendants and their respective counsel, but the proposition was declined. A further offer was made to furnish copies, which was also declined.

Rebecca and Aquila further say that Hannah Lippincott and Hope Haines did pay to them, respectively, on the 25th June, of each of the years 1840, 1841, 1842, 1843, to Rebecca \$735.33, and to Aquila \$421.11. That no payments have been made to either of them on that account since June 25th, 1843, either by Hannah or Hope. That the three first years' payments were

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made to Rebecca in money ; for the last two years Hannah and Hope gave their bond to her, conditioned for the payment of \$1477, with interest, dated June 25th, 1843, which bond she now holds, but has received on account, January 8th, 1844, \$942.50, a credit for which is endorsed on the bond. That to Aquila three payments were made, partly in money and partly in securities, but he cannot state how much in each, having kept no precise accounts.

Annexed to these answers, and referred to in them, is a writing under the hands and seals of Hope Haines and Hannah Lippincott, dated June 25th, 1839, marked Exhibit 2, reciting that Hope Cowperthwaite, deceased, by her will dated October 22d, 1818, and by a codicil thereto dated December 10th, 1824, gave and bequeathed to her grandson, Aquila S. Ridgeway, certain sums of money, a part to trustees for his use, and a part to him absolutely, and that Hannah Lippincott and Hope Haines, the trustees in the said will and codicil named for the said Aquila, and who are the executrices of the said will and codicil, and the said Aquila having adjusted and settled all accounts in relation to the estate of Hope Cowperthwaite and in relation to the moneys so bequeathed to the said Aquila, between them ; and that Hope and Hannah, as the two executrices of the said will and codicil, had paid to Aquila the balance of that part of the said moneys bequeathed to him absolutely ; and then proceeding thus :

“Now this writing made by us, Hope Haines and Hannah Lippincott, witnesseth, that we have now in our hands, as trustees of the said Aquila S. Ridgeway, according to the provisions of the said will and codicil, seven thousand and eighteen dollars and twenty-seven cents, which we are to hold and retain in our hands in accordance with the provisions of said will and codicil, and to be paid out by us to the said Aquila S. Ridgeway, in conformity to the provisions of the said will and codicil in relation thereto. This writing being simply for the purpose of showing the amount which we have in our hands for the said Aquila S. Ridgeway under the provisions of the said will and codicil, and not to alter or vary his rights in the least in relation thereto. Signed, sealed and delivered in the presence of Craig Moffit, C. M. Harker.”

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And another writing executed under the hands and seals of Hope Haines and Hannah Lippincott, dated June 26th, 1843, reciting that Hope Cowperthwaite, by her said will and codicil, gave and bequeathed unto Hannah Lippincott, Hope Haines, and Aquila S. Ridgeway, and to the survivor of them, and the executors, administrators, and assigns of such survivor, a certain portion of her estate, to be held by them in trust for her daughter, Rebecca Zilley, and her children, as in said will and codicil is particularly set forth; and that Hannah Lippincott, Hope Haines, and Aquila S. Ridgeway, who are the executors of the said will, have adjusted and settled all accounts in relation to the said estate, and then proceeding thus:

“Now this writing given by us, Hannah Lippincott and Hope Haines, two of the said trustees, Aquila S. Ridgeway, the other trustee, having resigned his trusteeship, which resignation was accepted by the said Rebecca Zilley, witnesseth, that there was remaining in the hands of Hannah Lippincott and Hope Haines, trustees as aforesaid, on the 25th June, 1839, \$12,255, and no more, in trust for the said Rebecca Zilley and her children, the said Rebecca having before that day received of and from her said trustees \$2483.53, in part payment of the money so left her in trust; and we, the said Hannah Lippincott and Hope Haines, do hereby declare this writing is merely given for the purpose of showing the amount of money in our hands on the said 25th June, 1839, in trust for the said Rebecca Zilley, under the provisions of the said will and codicil, and not to alter, change, or vary the rights of the said legatee or trustees in the least, in relation to anything contained in said will and codicil.”

There is also annexed to these answers a writing marked Exhibit O, being an instrument under the hands and seals of Hope Haines and Hannah Lippincott, dated June 25th, 1839, reciting that Aquila S. Ridgeway, by the will and codicil thereto of Hope Cowperthwaite, deceased, was appointed, jointly with Wallace Lippincott, trustee of the one-fourth part, &c., for the use and benefit of Hope Haines, subject to the powers and provisos contained in said will; and that he was appointed trustee, in the same manner, of the Hannah Lippincott fourth; and that Wallace Lippincott having died, Aquila is now sole surviving trus-

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tee of said Hope and of said Hannah; and then declaring that they, Hope and Hannah, have in their hands, respectively, the whole amount of the principal and interest of each of their shares, either in cash or securities; and that "though the said Aquila has been and now is our trustee as aforesaid, and the said securities are taken in his name as said trustee, yet he hath not at any time received any part of said estate or money so coming to us as aforesaid, but the whole hath remained in our hands from the death of the said Hope Cowperthwaite, and still so remains. And we do acquit and discharge the said Aquila S. Ridgeway, his heirs, &c., from all and any liability in consequence of our having retained in our hands the said portions so bequeathed to us, and the evidences and securities thereof. And as it is our intention to retain in our hands the said portions and the evidences and securities therefor, and have the same under our own control and management, although the said Aquila S. Ridgeway is to continue our trustee, we do, therefore, for this acquit and exonerate him, his heirs, &c., from all liability which he may incur by permitting the said portions to remain in our hands, with the evidences and securities, under our management and control."

Several other exhibits were produced, and much testimony was taken on both sides.

The case was heard on the pleadings and proofs.

J. P. Bradley and *F. T. Frelinghuysen*, for the complainants. They cited 1 *Sugden on Powers* 373, 384, 387, 398, 419; 2 *Meriv.* 533.

William L. Dayton and *Peter D. Vroom*, for the defendants. They cited 1 *Sugden on Powers* 388; 1 *Story's Eq.*, §§ 97, 170, 173, 175; 2 *Sugden* 95, 127 to 141; *Jeremy's Eq.* 371, 2, 3, 4; 8 *Ves., Jr.* 609, 616; *Ambler* 681.

THE CHANCELLOR, before proceeding to deliver his opinion, remarked that an abstract of about forty folios, which he had made, contained all the testimony that was material; that, to sift that out, he had been obliged to go through 262 folios. That

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it should be recollected that unless a judge was satisfied that he had a distinct view of everything material in the testimony, he could not feel willing to decide a cause, and that the burden of wading through a volume of useless matter should not be imposed.

THE CHANCELLOR. The question in this case is whether the securities which have been inventoried, appraised and taken by the executors of Hope Haines as belonging to her estate, (other than those which she held in her individual name,) belong to the trusts created by the will of Hope Cowperthwaite, or belong to the estate of Hope Haines, and are to be disposed of under her will. If the disposition of these securities was the same under both wills, it would probably be of no great importance which set of trustees should have the charge of them. But the disposition of the different wills is different, and the question involved affects substantial interests of opposing claimants to these securities. The *cestuis que trust* under the different wills are different, not altogether so, indeed, but sufficiently so to make it a question between substantial adverse claims. These securities belong to the trusts under Hope Cowperthwaite's will, unless something has been done conformably, in the judgment of a court of equity, to the provisions of that will, withdrawing them from those trusts and making them the property of Hope Haines, discharged from those trusts. The oar is in the hands of the executors of the will of Hope Haines, and they have voluntarily taken it.

(The Chancellor here stated the character of the securities, and classified them.)

Hope Cowperthwaite, the first testatrix, left five children, being children by her first husband, Lippincott, namely, one son, Wallace Lippincott, and four daughters, Martha Woolston, Rebecca Zilley, Hope Haines and Hannah Lippincott. She gives her son Wallace only a small sum, he having been provided for in her lifetime.

After certain bequests, she divides her personal estate into four parts, and bequeaths one-fourth to trustees for each daughter, with certain provisions and limitations in reference thereto.

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Wallace Lippincott and Hope Haines are by the will appointed the trustees of the Martha Woolston fourth. By the will and codicil, Hope Haines, Hannah Lippincott and Aquila S. Ridgeway are the trustees of the Rebecca Zilley fourth. Wallace Lippincott and Aquila S. Ridgeway were appointed the trustees of the Hope Haines fourth, and also of the Hannah Lippincott fourth; and on the death of Wallace Lippincott, Aquila S. Ridgeway became the sole surviving trustee of Hope Haines fourth and of the Hannah Lippincott fourth; and by the death of Hope Haines, Hannah Lippincott and Aquila S. Ridgeway became the surviving trustees of the Rebecca Zilley fourth. Hannah Lippincott, Hope Haines and Aquila S. Ridgeway were appointed executors of the will and codicils, and since the death of Hope Haines, Hannah Lippincott and Aquila S. Ridgeway are the surviving executors.

The trusts of the different fourths are of the same general character.

The trust in reference to the Hope Haines fourth is, in substance, as follows: This fourth is bequeathed to Wallace Lippincott, since deceased, and Aquila S. Ridgeway and to the survivor of them, in trust, to place the same at interest, and to pay the interest arising thereon, yearly, to Hope Haines so long as she shall live; and also in trust to pay to Hope Haines so much of the principal as she shall, from time to time, by writing under her hand, attested by two credible witnesses, require of the said trustees; and if she shall leave children living at her death, or descendants of children, then that what shall remain undisposed of, of the said fourth, with its accumulated interest, shall belong to and vest in her children, to be paid to them at twenty-one, respectively, the issue of any deceased child to stand in the place of the deceased parent; but if she die, not leaving any child or descendant of any child living at her death, then that the trustees pay what may remain of this fourth undisposed of at the time of the death, with its accumulated interest, unto such of her brothers or sisters or their children, in such proportions as she, the said Hope Haines, shall by will or writing in nature thereof, sign by her hand, and attested by two credible witnesses, direct and appoint; she, the said Hope, in such case,

to have power to dispose of the same among her brothers and sisters and their children, in such proportions as she may think fit, but to no other person or persons whomsoever; and if she die, not leaving any child living at her death, nor descendant of such child, and without having made such appointment, then that the said trustees pay what shall remain undisposed of, as aforesaid, of this fourth, unto the brothers and sisters of the said Hope, in equal proportions, (the shares of any sisters that may then be married to be paid to their trustees, for their separate use, free from their husbands' control.) The children of any deceased brother or sister to stand in the place of his, her, or their parent.

On the 25th June, 1839, there was an ascertainment of the amount of the estate. It is called a settlement. The exhibits, I think, show that it was intended as a settlement of the executors' accounts; and it is to be considered, for the purposes of this case, in the same light as a settlement in the Orphans' Court would be.

Hope Haines died leaving no child or descendant of any child.

The bill is filed by Hannah Lippincott, Aquila S. Ridgeway and Rebecca Zilley; Hannah and Aquila claiming to be surviving trustees of the Rebecca Zilley fourth; Aquila claiming to be the sole surviving trustee of the Hope Haines and Hannah Lippincott fourths; and Rebecca Zilley being a *cestui que trust* of the fourth bequeathed in trust for her, &c. The object of the bill is to recover from the executors of Hope Haines the securities inventoried and taken by them as belonging to the estate of Hope Haines, other than those which stand in her own name.

As to the Hope Haines fourth, the first question is, did Hope Haines, in her lifetime, require the said trustees to pay to her any part of the principal of this fourth, in the manner prescribed by the will for that purpose, or in any manner which should be considered in equity as equivalent thereto?

It is contended, on the part of the defendants, that the settlement of the estate by the executors, the assignments by Aquila, one of the executors, to Hannah and Hope, the other two executors, and the Exhibit O and the other exhibits in the cause,

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should be considered as amounting, in effect, to a requirement by Hope Haines in her lifetime, on her trustee, Aquila S. Ridgway, to pay to her the principal of the Hope Haines fourth.

As to the settlement, it was necessary or proper, in order to ascertain the amount of the estate which would be subject to trusts. It seems to have been in lieu of a settlement by the executors in the Orphans' Court. As to the assignments by Aquila, they were assignments by one of three executors to the other two, of all his interest in the securities so assigned. As to Exhibit O, it does not seem to me to furnish sufficient evidence that Hope intended by it to extinguish the trust as to the Hope Haines fourth; and, as has been observed before, the burthen is on the defendants to show enough to enable the court to affirm that such was her intention. The fact that she did not adopt the mode prescribed in the will for doing it, is certainly to be considered as opposed, more or less, to the idea that she intended to do so. If she had so intended, she had only to declare that intention to the trustee, by writing under hand attested by two witnesses. When she could do it by so plain and easy a mode—a mode that would have been subject to no misapprehension—would so careful a woman, scrupulously particular, according to the accounts we have of her, be likely to be satisfied with any other mode, or, at any rate, with one so equivocal in its character as that from which the counsel for the defendants ask us to infer such intention on her part?

Again, Exhibit O, after reciting that Aquila, since the death of Wallace Lippincott, is the sole surviving trustee of the Hope Haines fourth, and of the Hannah Lippincott fourth, expressly declares that "he is to continue our trustee." All the securities belonging to the trust had remained in the hands of Hope and Hannah, two of the executors of the will of Hope Cowperthwaite, from the time of her death, in 1829, up to the said settlement and the date of this exhibit, June, 1839; Aquila, the other executor, consenting to it.

After a careful examination of the testimony and exhibits in the cause, I do not feel willing to affirm that what was done on the 25th June, 1839, was intended by Hope Haines as an execution of the power given her to withdraw the principal money

from the trust.

If it was intended by her to do something, on that day, in or towards, or as equivalent to the execution of the power, we must suppose that such intention would have been communicated to her counsel who drew the writings; and it appears to me to be beyond all credence that counsel, having the idea of such intention on her part in his mind, could have drawn so many writings in reference to the different fourths, and avoided any expression of such intention. But there is not only an entire absence of any such expression, but, as if for the purpose of excluding a conclusion that she intended to do so, a clause is inserted in Exhibit O, expressly declaring that Aquila is to remain a trustee. When the meaning of a party's act is so equivocal and difficult to be understood, I see no reason for rejecting his express declaration of what he does mean. But if this declaration is to be considered as not conclusive, it is certainly entitled to weight in examining the case with a view to ascertain the intention of Hope Haines, and I think it may be safely said, that nothing stronger than conjecture can be reached in opposition to this declaration. How are we to apply principles where we have only conjectures in place of established facts?

The court may aid a defective execution of a power, but will not supply the execution where none has been attempted or intended. It will not do that for a party which he does not think fit to do for himself. 1 *Story's Eq. Jur.*, § 170.

The only safe principle, as it seems to me, on which this cause can be decided, is this: Where the circumstances are so equivocal as to leave the mind in doubt whether an execution of the power was at all intended, the court should not interpose. An intention to execute the power should clearly appear. 1 *Story*, § 172.

I will not guess on either side in the case—either that Hope Haines intended to withdraw the principal from the trust, or that she intended that the yearly interest received by her was to be added to the principal and subjected to the trust. The interest was to be paid to her by her trustee, yearly, without any demand; and when she received it, she received it as hers absolutely, not subject to any trust. It is not easy to perceive how

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she could, after receiving the interest, add it to the trust fund. At all events, something affirmative would be necessary—something equivalent to declining to receive the interest from her trustee and leaving it to accumulate in his hands.

As to the question, then, whether Hope Haines did anything in her lifetime equivalent to requiring her trustee, conformably to the will of Hope Cowperthwaite, deceased, to pay her the principal of this fourth, to be her own, free from the trust, I am of opinion that there is no sufficient evidence that she did so.

As to the interest of this fourth, I am of opinion that, inasmuch as it was received by her, it is to be considered in the same light as if it had been paid to her by her trustee; and that there is no sufficient ground for holding that it became a part of the trust fund after being received by her.

It is difficult to perceive how the words "with its accumulated interest," used in the will, can apply to the interest which should be actually paid, yearly, to the *cestui que trust*, for her use, free from any trust.

As to the will of Hope Haines, it cannot affect the right to the custody of the papers belonging to the trust fund. The will of Hope Cowperthwaite provides that if Hope Haines die without leaving any child, or descendant of any child, then that the trustees of the Hope Haines fourth pay what may remain undisposed of of this fourth unto such of her brothers or sisters, or their children, as she shall by will direct. Even if the will of Hope Haines, therefore, can be considered as an appointment in favor of the persons named in the residuary clause thereof, the trustee under Hope Cowperthwaite's will would be the person to receive the money or these trust securities and pay it to the appointees.

Whether the persons named in the residuary clause of Hope Haines' will are entitled to this fourth is a question which it would not be proper now to decide.

As to the commissions claimed by Hope Haines, she was not entitled to commissions for investing and managing the fourth over which she had the power of appointment; and, it seems to me, I cannot act in this suit in reference to commissions to the executors of Hope Cowperthwaite's will.

Wheeler v. Redmond.

Hannah Lippincott is surviving obligee of the securities taken to her and Hope Haines; and it is claimed that she is entitled to the possession of them. I think this is so; and for this reason: the surviving co-obligee is entitled to half the moneys recovered on the securities; to oblige him to divide the securities, in amount, would subject him to the risk that some retained by him might prove worthless.

An order of reference will be made in accordance with the foregoing view.

Order accordingly.

SAME CASE, 2 *Stockt.* 164.

CITED in *Lippincott v. Ridgeway*, 3 *Stockt.* 531.

WHEELER v. REDMOND.

The report of a master on exceptions to answer is brought before the Chancellor, not by exceptions to the master's report, but by appeal.

In this case, exceptions had been filed to the answer, and a rule entered with the clerk referring the exceptions to a master, who decided and reported upon the exceptions.

Exceptions were filed to the master's report.

THE CHANCELLOR said that the proper mode of bringing the master's report before him in such case, was by appeal, and not by exceptions to the report. *Rev. Stat.* 910, § 29.

Best v. Schermier.

BEST v. J. M. SCHERMIER.

1. A receiver to collect rents from tenants of the mortgagor will not be appointed on filing a foreclosure bill.

2. A mortgagor may authorize the second mortgagee to collect rents from tenants of the mortgagor and apply them as payments on his mortgage; and he will not be restrained from doing so on the filing of a foreclosure bill by the first mortgagee.

On the 18th May, 1846, Schermier gave a mortgage to Ballentine for \$700. He had given several prior mortgages on the same premises. Several judgments had also been recovered against him; some prior and some subsequent to the mortgage to Ballentine. One of the prior mortgagees, the complainant in this case, filed a bill for foreclosure and sale of the premises, making all the mortgagees and judgment creditors parties defendants. This bill stated, that on the 18th May, 1846, Schermier assigned, transferred and set over to the said Ballentine the leases, rents, issues and profits of the mortgaged premises, and empowered him to collect and receive the rents due and to grow due. That Ballentine had already received some rents, and that a large amount of rents would shortly become due, and that Ballentine intended to collect the same and apply them to the payment of any money that might be due or become due on his said mortgage. The bill claims that the said rents should be paid on the prior mortgages, and prays foreclosure and sale, to pay the mortgages according to their priority; and that Ballentine be restrained from collecting the rents; and that a receiver be appointed to collect the same and hold them subject to the order of the court.

An injunction was granted, and a receiver appointed.

Ballentine answered the bill, and stated in his answer, that Schermier, at or about the time of giving said mortgage to Ballentine, and further to secure the bond of Schermier to him, secured by the said mortgage, executed an assignment to him, Ballentine, of all the rents, issues and profits of the mortgaged premises, and authorized him to collect the same, and apply them to or towards the payment of his said mortgage.

A motion was thereupon made to discharge the order appointing a receiver and restraining Ballentine from collecting the rents.

On the hearing of the motion, a deposition of A. C. M. Pennington was read, stating that Schermier, at the same time he gave Ballentine his mortgage, assigned to him the rents coming due, and appointed him attorney to receive the same; and that both the mortgage and the assignment of rents were the securities on which Ballentine advanced money.

A. C. M. Pennington, in support of the motion.

E. R. V. Wright and *J. W. Scott*, *contra*.

THE CHANCELLOR. I have uniformly denied applications to appoint a receiver of rents made on filing foreclosure bills. I have considered that the mortgagor is entitled to the rents while he is in possession by his tenants. I am satisfied that the contrary practice was inconsistent with what is now well understood to be the nature of a mortgage, and led to great oppression. The view I had taken was sustained by the Court of Errors and Appeals in the case of *Sanderson v. Price*.

Schermier would not have been restrained from collecting the rents; and, he having assigned them to Ballentine and authorized him to collect them and apply them as payments on his mortgage, I see no reason why Ballentine should not be permitted to collect them.

The order appointing a receiver of the rents and restraining Ballentine from collecting them will be vacated.

Order accordingly.

CITED in *Cortleyou v. Hatheway*, 3 Stockt. 43.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE

STATE OF NEW JERSEY,

MARCH TERM, 1847.

OLIVER S. HALSTEAD, ORDINARY.

JOSIAH H. REEVES, APPELLANT, AND ENOS P. REEVES AND
JACOB P. REEVES, RESPONDENTS.

A father devised to his three sons certain lands, as tenants in common during their natural lives, and after the death of either of them, his share to go to his lawful issue; and if any of his said-sons should die without leaving lawful issue, his share to go to the survivors of them; or if any of them have deceased, their lawful issue to have the share that would have gone to their father if living. *Held*, that no partition could be made among the sons except of their present interest or estate in the lands.

This is an appeal from a decree of the Orphan's Court of the county of Salem, directing the division of certain lands devised by the will of Stephen Reeves, deceased, among the devisees thereof.

The will of Stephen Reeves, deceased, late of the county of Salem, devises to his three sons, Enos P. Reeves, Jacob P. Reeves and Josiah H. Reeves, certain lands, (described in the will,) "all which said lots and tracts of land, buildings, mills,

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waters, improvements, hereditaments, and appurtenances herein given and devised to my said sons, Enos P. Reeves, Jacob P. Reeves, and Joseph H. Reeves, I do devise and give to them, as tenants in common during their natural lives, which, after the death of either of them, the said share of the said deceased son to go to their lawful issue; and if any of my said sons shall die without leaving lawful issue, then their share to go to the survivors of the said three; or, if any of them have deceased, their lawful issue to have the share that would have gone to their father, if living."

On the petition of Enos P. Reeves and Jacob P. Reeves, to the Orphans' Court of Salem, stating that the said testator died leaving a will devising to his said three sons the following described property, tracts, and pieces of land (describing them), "all of which, &c., I do devise and give to them as tenants in common, &c.," without setting out the will more particularly, and stating that said Josiah H. Reeves is a minor—under the age of twenty-one years—and praying that the said court order and direct a division of such real estate, in fee, to be made agreeably to the true intent and meaning of the said will, and appoint commissioners to ascertain the metes and bounds of each devisee's share, according to law. The said Orphans' Court, in August, 1846, made an order as follows (after reciting the said application): "And it now appearing, by the will of the said Stephen Haines, that he did devise the above-named property to Enos P. Reeves, Jacob P. Reeves, and Josiah H. Reeves, and that Josiah H. Reeves, one of the said devisees, is under the age of twenty-one years, it is ordered and decreed that a division of said lands be made as follows, to wit, to Enos P. Reeves one-third part thereof in fee; Jacob P. Reeves, one-third part thereof in fee, and Josiah H. Reeves, one-third part thereof." The order then appoints commissioners to make division, and concludes thus: "which division shall be conclusive to all parties concerned, as well the present as the remainder-men."

A. L. Eakin, for the appellant, cited 1 *Green's Rep.* 284; 6 *Halst.* 94; *Coxe N. J. Rep.* 3; 3 *John.* 20; 4 *Halst.* 93.

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THE ORDINARY. If there could be a division of the fee among these three sons, each might receive, in fee, the share allotted to him. But the will provides that if either son die without leaving lawful issue, his share shall go to the survivors, &c. No division among the three sons can operate to give each a present fee. The terms of an order for division in this case should be confined to the present interest or estate of the sons.

Decree reversed.

CASES IN CHANCERY,

JUNE TERM, 1847.

FRANCIS HEWITT ET UX. v. NATHANIEL J. CRANE ET AL.

1. When a father devises an estate to a son and daughters, the son knowing its value, and the daughters not knowing it, the son, when he enters into a treaty with the daughters for a different settlement and disposition of the estate among them, must apprise the daughters of its value, of their rights, and of every circumstance necessary to enable them to treat upon terms of equality; and concealment, misrepresentation, or any conduct on his part, calculated to put them at a disadvantage in the negotiation, will be fatal to the contract in a court of equity.

2. Courts of equity look with favorable eye on agreements made to preserve and maintain the peace of families, but only so far as such agreements are fairly obtained. If obtained by concealment and misrepresentation as to the value of the estate, courts of equity will not sustain them.

3. Before a party can be examined as a witness, an order must be obtained for that purpose.

This cause was heard by Stacy G. Potts, Esq., one of the masters of the court, the Chancellor having been concerned as solicitor and counsel for the complainants—the counsel of the respective parties having requested that Mr. Potts might be selected to hear the cause.

The facts of the case appear fully in the opinion delivered by the master.

Oliver S. Halsted, Jr., and A. Whitehead, for the complainants.

Robert Vanarsdale and Peter D. Vroom, for the defendants.

STACY G. POTTS, MASTER. Joseph Crane, of the county of

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Essex, departed this life September 27th, 1832, having first made and executed his last will. He left six children, Nathaniel Jones Crane, one of the defendants, his only son, and Hannah, Rachel, Phebe—wife of Alfred Keene—Eunice, and Amanda, his daughters, him surviving, all, at the time, unmarried, except Phebe.

By his will, dated the day before his death, he devised to Jones, the son, one-half of his cider-house and one acre of land adjoining the same; bequeathed \$800 to Amanda, and the remainder of his estate he devised to Jones, Phebe, Hannah, Rachel, and Eunice, and their heirs, to be equally divided among them, and appointed Charles R. Akers his executor.

His estate, at the time of his death, consisted of the homestead farm, near Belleville, containing seventy-seven acres; a lot of Woodland in Caldwell, containing seventy-five acres; fifteen and a half acres of salt meadow, and personalty amounting to \$3518.04.

His debts and funeral expenses were \$192.89, which, with Amanda's legacy of \$800, made \$992.89 to be paid out of the estate.

Soon after his death, negotiations were set on foot for a different disposition of the estate from that made by the will, which resulted, on the 15th of October ensuing, in an arrangement among the four eldest devisees, Jones, Phebe, Hannah, and Rachel—Eunice being a minor—by which Phebe Keene and her husband took what is called the corner-house and two acres of land adjoining, part of the homestead, valued at \$550, and Jones' bond for \$950—in all, \$1500. Hannah and Rachel each took Jones' bond for \$1000, payable to them or their order, if they should demand the same in one year from date, without interest, and Jones took the residue of the whole estate, subject to the debts, the legacy to Amanda, and the widow's dower.

In July, 1835, Rachel married Francis Hewitt, and on the 14th of October, 1836, they filed their bill against Jones, alleging fraud, misrepresentation, and concealment on the part of Jones in procuring this agreement, and praying that it may be set aside, so far as the complainants are concerned, and they let in to take under the will. There is also an allegation that Han-

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nah was incompetent to contract from weakness of mind, and that the complainant Rachel, as one of her heirs, had an interest in her estate that ought to be protected, and a prayer for general relief.

Hannah died without issue, pending the suit. After the bill was filed, the other devisees were made defendants.

Much testimony has been taken; the case has been elaborately argued; it involves important principles and consequences, and demands a deliberate and careful examination.

The principal difficulty lies in settling accurately the facts of the case. There is no question as to the character and quantity of the real estate, and I am disposed to make none as to the amount of the personalty. The first issue made by the pleadings and evidence is as to the fraud, misrepresentation and concealment in procuring the agreement alleged by the bill and denied by the answer.

To this issue, the testimony of Akers, the executor; Keene, the husband of Phebe, and Frost, who was the principal actor in bringing about the agreement, is directed.

An objection is made to the testimony of Keene, by the counsel of the defendants. The wife of Keene is a sister of Hannah, and one of her heirs-at-law; and, if the complainants succeed, is entitled to her share of whatever may be found due to her as one of the devisees of her father. The interest of the wife is, in this case, the interest of the husband; and though Keene's testimony was taken previous to Hannah's death, yet, upon the case as made in the bill, I think the objection must prevail. For, though his interest at the time in Hannah's estate was remote and contingent, yet, if the complainant succeeds, the record in this case might be important evidence for him in a suit brought by himself and wife; besides, the bill was demurred to on the ground that he, with others, was not a party; the demurrer was submitted to, and he was made a defendant, and no order was obtained for his examination. Before a party can be examined as a witness, an order ought to be obtained for that purpose. *Sharp v. Runk & King*; 1 *Halsted's Digest* 234; 1 *Newland's Ch. Pr.* 280.

Akers' testimony goes merely to show that he was making

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preparations to enter upon his duties as executor under the will, when, a few days after Mr. Crane's death, Frost called on him and inquired whether he was willing to decline acting as executor, provided the devisees could arrange among themselves; he assented; agreed it would be better for them to do so, if they could; postponed any action till Mr. Frost made the result known to him, and then went, with Frost and Jones, to the surrogate's office and renounced; and Jones administered with the will annexed.

We are left, then, to the testimony of Mr. Frost. He was the brother-in-law of the testator. The narration he gives of the commencement, progress and conclusion of this arrangement is substantially as follows: He states that he was present at the funeral of the testator; that the family were in great distress, both on account of the death and the dispositions of the will, and pressed him to come down the next day. He did so. The will was read. Jones appeared dissatisfied with it, and none of the family appeared satisfied. When it was found Amanda had a legacy of \$800, Rachel Ann said she would rather have that than her share of the land; she didn't know what she would do with the land. This he says led him to think whether Jones could not give them *this amount* and keep the land.

Hannah was willing. He went to Phebe Keene and told her. She was willing to do as the rest did, but her husband, Alfred Keene, kept back. He said it was not a full portion.

Mr. Frost persevered. He visited Keene four or five times in the course of a few days, and pressed the matter, and Keene finally proposed \$1500 as the least he would take.

Frost informed Jones of this, and Jones said: "Then I shall give it up; I shall never think of settling." Frost, however, suggested that he and Jones should go into a calculation and see whether it was out of the way or not. They then made a calculation, and upon that calculation the estate amounted to a little over \$1500 a share.

Frost then insisted that Jones should pay the girls \$1000, instead of \$800, and pay the debts and legacy. Jones objected; said it would involve him too much in debt; but finally yielded to Frost's solicitations and appeals, and agreed that he should

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offer them \$1000; and no further objection seems to have been made to Keene's demand of \$1500.

The compromise then progressed. Frost proposed that Phebe Keene should take the corner house and lot as part of the \$1500. She and her husband were willing, if they could agree with Jones upon the price. Jones was very loth to give it up, but finally agreed to let them have it, first, at \$500, then at \$550, having discovered that the lot contained half an acre more than was first supposed; and Keene and wife were to have Jones' bond for \$950.

Frost's account of the negotiation with Rachel, after this calculation had been made, is as follows: He says he first asked Rachel, "Are you willing to take \$800, as you have offered?" She said she didn't know but she should be, rather than take the land. Said he, "Rachel, the shares amount to \$1500, as near as we can come at it; but there are \$200 debts, \$800 legacy, and the widow's dower to come out; now, Jones has agreed to give you \$1000, and take them on himself; will you be entirely satisfied?" She said, "Yes, entirely satisfied." "Well, now," said he, "Jones will, besides, pay for the clothing you got on the funeral occasion." Then she clapped her hands and said, "I will never open my mouth, if it should be worth ten times as much."

Hannah, he says, simply acquiesced uniformly in what the others did.

Some other facts are stated by Frost which are important.

We learn from him that Jones was greatly dissatisfied with the will, and that this dissatisfaction exhibited itself very soon after the father's death. He said, in the earliest conversations about the estate, that he would sell his share and go away, if he could not get the whole of the real-estate; he would sell out his interest, and have nothing to do with it. This would break up the family. This, Frost deprecated, and labored to secure such terms for him as would induce him to remain.

Whether Jones knew the real amount of the estate or not, it is manifest Frost did not, at the time he first entered upon the plan of bringing about the arrangement, nor does it appear he learned it accurately afterwards. He proceeded, not upon the ascertained value of the property, but upon the idea that Jones

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must be somehow satisfied ; and took as his basis the legacy of \$800 left Amanda and the remarks of Rachel and Hannah, that they would prefer that to their share of the land ; and the idea never seems to have occurred to Frost that it was important to know the value of the interests with which he was dealing, until Keene insisted that he would take no less than \$1500.

And, again, the calculation which he and Jones then made was manifestly erroneous. They had no papers, kept no memoranda, and did not exhibit even the estimate they made to the other parties. Frost does not remember what the farm or meadow was put down at ; and he thinks the personal estate was set down at \$1000—a mistake remarkable, when it is remembered that this was some days after the death ; that there were good money securities then in the house where the calculation was made, amounting to near \$2500, and other property in the house and on the farm worth over \$1000.

And it is clear that, from the beginning to the end of this negotiation, neither Jones nor Frost ever made out for the examination of the sisters, any inventory or estimate of the value of the real and personal property, nor ever gave them any information on the subject, except the communication that Frost made to Hannah and Rachel, after the calculation above mentioned.

In this state of facts it becomes important to settle, if we can, two questions : 1. What was the value of the estate at the time ? 2. Did Jones know it ?

Several witnesses have been examined as to the value of the land. Farrand, Riker, Crane, and Sidman put the homestead farm at about \$100 an acre ; Randolph, Munn, and Cooman put it from \$3850 to \$4620 in the whole. There were 77 acres, generally good land. The buildings, though old, were substantial, and in pretty good order. It is admitted to have been worth \$300 per annum, in 1832, and \$400 now. Jones sold from it about \$1500 of wood in lots, as it stood. Good land, in that neighborhood, was worth \$100 an acre, and would yield \$6 an acre clear. There was a cider-house on it, valued, with the land on which it stood, at \$400, and a house called the corner-house, which, with the lot of two acres, was valued at \$550. Weighing this testimony in connection with these facts, I think \$7000

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a low estimate of the value of the farm in 1832. A fair average of the value fixed by the witnesses will bring the 75 acres in Caldwell to \$1100, and the salt meadow to \$300. This will give us \$8400 as the actual value of the real estate.

This was subject to the dower of Mrs. Crane, the widow. The witnesses fix the value of this at about \$1000. The third of \$8400 is \$2800, the interest of this \$168 per annum. She was 61 years of age. Upon the principles adopted in the annuity tables used by insurance companies, a woman of 61, of good health and constitution, must pay \$1600 for a life annuity of \$160; and deducting \$8 per annum as the profit of the insurer, \$1600 would be exactly equal to her dower in the real estate. I am disposed to adopt this as the fair value. This would leave the real estate worth \$6800 free and clear of dower; then deduct \$300 as the value of half the cider house with the one acre lot devised to Jones, and it leaves a clear real estate of \$6500 for the general devisees.

Then take the personal estate at the value admitted by Jones, \$3518, and deduct the debts, \$192, the legacy to Amanda, \$800, and \$200 for commissions and expenses in settling the estate, and it leaves of personalty \$2326. Add to this the \$6500 of real estate, and we have \$8826 as the entire value of the estate devised to Jones, Phebe, Rachel, Hannah, and Eunice, or \$1765 each share.

I have not taken into consideration, on the one hand, the alleged undervaluation in the inventory of the personalty, nor, on the other, the alleged claim of Jones against the estate for services. I do not think either sufficiently proved.

But, 2. Did Jones know the real value of the estate at the time?

The allegations of the bill are that Jones was fully aware of the amount of money at interest; that complainant was ignorant, &c., and that he fraudulently concealed the information, &c. And again, that he knew the fact of there being money at interest, and the amount thereof, &c.; and that after he had, by means of his more favorable situation for the purpose, being the only son of the family, made himself acquainted with the nature and amount of the estate, he conceived the design, &c.

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The defendant, in his answer, does not deny that he was aware of the amount of money at interest, or that he had made himself acquainted with the nature and amount of the estate. But he says that during all the time the subject of such arrangement was under consideration, all the bonds, notes, vouchers, securities, accounts, and other papers of the said Joseph Crane were in the possession and custody of his widow, the mother of the said Rachel Ann, and of this defendant, and not in the custody and possession of this defendant, and were as accessible to the said Rachel Ann as to this defendant. That he is informed and believes the value of the estate, real and personal, and Rachel Ann's interest and right therein was fairly and correctly represented to her by Frost; and denies that he was relied upon to furnish information respecting said estate, or that he concealed or attempted to conceal the value from her, or undervalued her right and interest in it.

This, so far from being a denial, is a substantial admission of the charge that "at the time of the negotiation he knew the true value and amount of both the real and personal estate."

That Rachel and Hannah, on the other hand, were ignorant of the real value of the estate, I think is manifest. They offered to take \$800 when the shares of the personalty alone amounted to nearly \$500 each, and it can hardly be supposed they would have been contented with that sum had they known this fact. It was putting their shares of the land at but a little over \$300. The calculation made by Frost and Jones after Keene demanded \$1500, was communicated to them as a new discovery made in the case, and Rachel said when the \$1000, &c., was offered, that she would never open her mouth if it turned out worth ten times as much. This testimony is abundantly sufficient to rebut any presumption of knowledge which might be drawn from these circumstances and situation.

The case then, in short, is this: The defendant, aware that the sisters' shares of the estate, under the will, was over \$1700 each, and without disclosing the true value, of which they were ignorant, to them, but causing or permitting the shares to be represented as worth only \$1500, chargeable with debts, legacy, dower, &c., purchased the interests of Rachel and Hannah for

\$940 each, (that being the real value of the bonds he gave) paying some small bills for Rachel in addition, and at the same time purchased the share of another sister, Phebe Keene, for \$1500.

The answer of the defendant to this case is, the sisters were of age, were competent to contract, had the means of ascertaining the value of the property they were disposing of, were desirous of the arrangement, satisfied at the time the contract was executed, they acquiesced in it for several years, and it was a family arrangement designed to keep the property and the family together, and as such should be favorably regarded by the court.

We are then to inquire for the rules of law as administered by courts of equity in cases of this kind. It is the case of an agreement fully executed, and which must be sustained unless tainted with actual or constructive fraud in its inception.

And, 1. As to the objection of the acquiescence of the complainant up to the time of her marriage, the circumstances here, and the cases of *East and ux. v. Thornbury*, 3 Peere Wms. 127, and *Gillespie v. Moon*, 2 Johns. Ch. R. 585, and several other cases hereafter cited, furnish a sufficient answer.

In *East and ux. v. Thornbury*, the plaintiff had a legacy of £300 by the will of her uncle, payable one year after his death. The testator died in 1707. The legacy remained unpaid, and in 1721 the plaintiff demanded it. The executor desired them to wait two years; they consented, and under the impression that they were only entitled to interest on the legacy from the date of the demand, at the end of the time they received the £300 and two years' interest, and gave a receipt for it and the two years' interest up to the time of payment. The plaintiffs acquiesced in this settlement for 7 years, and then filed their bill, alleging the mistake and praying to have the arrears of interest paid. It was contended by the defendants that there was no pretence of fraud, no concealment or misrepresentation, that the will was of record and as accessible to the plaintiff as the defendant, that the plaintiff was a barrister at law and presumed to know his rights, and that the receipts were drawn by himself. But the court said the plaintiffs were, notwithstanding this, entitled to

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have the mistake corrected, and decreed the interest to be paid.

In *Gillespie v. Moon*, it was held that a mistake made by the grantor in a deed, by which she conveyed fifty acres more land than she intended, might be corrected, though she had for several years taken no step to correct it, and although, in the meantime, the purchaser had put improvements upon the part not intended to be included by the grantor. And the Chancellor said it would be a great defect in the moral jurisdiction of the court if there was no relief for such a case.

2. Misrepresentation or concealment has always been held a clear ground for equitable relief against a contract brought about by such means. In *Fulton's Ex'rs v. Roosevelt*, 5 *Johns. Ch. R.* 173, Fulton bought a tract of land which was represented by the defendant to contain a valuable coal mine; the representation turned out to be untrue. The mine was not situated as represented, nor was it as accessible or as valuable, and the court enjoined the defendant from recovering the consideration agreed to be paid for it. This case was carried to the Court of Errors, and the decree affirmed. 2 *Cowen* 129. In this case, it seems Fulton made the application to purchase; Roosevelt communicated in writing the facts which induced him to place great value on the mine, and referred Fulton to Baker, an engineer in Fulton's employ, who confirmed the defendant's statements. The books are full of cases of this kind. But it is to the class of cases which relate to family settlements, and are more strictly analogous to the one in hand, that I have chiefly directed my attention.

Judge Story, in his valuable treatise on Equity Jurisprudence, Vol. I., Sec. 217, lays it down as a settled principle, that in cases of family agreements and compromise, if there is any concealment of material facts the compromise will be held invalid, upon the ground of mutual trust and confidence reposed between the parties, and he cites *Gordon v. Gordon*, 3 *Swanston* 399 to 477; *Leonard v. Leonard*, 2 *Ball and Beatty* 171 to 182.

Gordon v. Gordon, above referred to, was several times elaborately argued, and decided by Lord Eldon upon great consideration. The case was that of two several agreements between two brothers, for the division of the family estates. One made

twenty years and the other four years before the filing of the bill; the eldest had been led to believe that his father and mother had not been married till after his birth, and that he was illegitimate. The younger was aware, at the time of the agreement, that there had been a marriage *de facto*; not that he knew the marriage was a legal marriage, but that a ceremony of marriage, whether valid or not, had been performed previous to the public marriage, and previous to the birth of his elder brother. The elder brother was not aware of this, and he, the younger, did not disclose the fact to him. The Chancellor said it was his duty to disclose it. He admitted fully the doctrine of *Stapleton v. Stapleton*, 1 *Atkyns*, and *Cann v. Cann*, 1 *Peere Wms.* 723, cited by the counsel for the defendants here, that where family agreements have been fairly entered into without concealment or imposition upon either side, and with no suppression of what is true, or suggestion of what is false, which was the fact in both those cases, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement; but he said, that if James Gordon, the younger brother, knew that there was even a rumor of a private marriage, whether the fact had been so or not, yet, if he withheld it from his elder brother, the bargain could not stand. He said that in contracts of this kind full and complete communication of all material circumstances is what the court must insist on.

Stapleton v. Stapleton, 1 *Atkyns* 10, was considered by the court a reasonable agreement made between father and son, and no compulsion, concealment or misrepresentation pretended. It was held good.

In the case of *Cann v. Cann*, above alluded to, Lord Maclesfield admitted that if a party releasing is ignorant of his right, or if his right is concealed from him by the person to whom the release is made, these will be good reasons for setting aside the release; and in a note to that case, the case of *Broderick v. Broderick*, 1 *Peere Wms.* 239, is cited, and fully sustains this principle.

Leonard v. Leonard, the other case referred to by Judge Story, was decided in the Irish Chancery, by Lord Mannors, in

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1812. It was a bill to set aside a deed as fraudulent and void for misrepresentation and mistake. Estates were purchased by two half brothers; one died, and the heir of the deceased released to the survivor, for an annuity of £100, in consequence of an opinion adverse to the heir, obtained of counsel by the survivor, upon a case stating that the estates were held by original parties in joint tenancy; but it turned out that they held some of them as tenants in common. The case on which the opinion was founded had been submitted to the agent of the heir before it passed into the hands of counsel, and he made some alterations in it. But the survivor had the title deeds. The heir had acquiesced in the arrangement nine years. The release was set aside. The court said, when it is made manifest that the compromise was entered into between parties under a misapprehension of a fact known to the one party or his agent, and unknown or misrepresented to the other, the compromise is deficient in that which is essential to its validity—that both parties were in equal ignorance.

Stockley v. Stockley, 1 *Vesey and Beame* 23, cited by defendant's counsel, was a case decided by Lord Eldon, 7 years before the case of *Gordon v. Gordon*, and does not conflict with it in principle. There was no misrepresentation, no concealment, no mistake in that case; it was a case of ambiguity in a devise, and a settlement thereupon by two brothers under the advice of the grandfather and in his presence. The difficulty arose 18 or 19 years afterwards, on the grandfather's death. One of the sons alleged that he assented to the agreement upon the promise of the grandfather that he would make up the difference in value between the lands exchanged under the agreement, to the elder brother in his will; that brother formed expectations from the will that were not realized, and resisted a bill for specific performance of the agreement. Under these circumstances, the court established the agreement.

Pullen v. Ready, 2 *Atkyns* 587, was where legacies were given, to be forfeited by marriage without consent. One of the legatees did marry without consent; and a family arrangement took place, giving him the benefit of the legacy notwithstanding. In this case, in the language of Lord Hardwicke, "the agree-

ment was made after the marriage, and with the will out of which the forfeiture arose lying before the parties and their counsel." It was sustained.

Corey v. Corey, 1 *Vesey* 19, was a family agreement reasonable in itself but its enforcement was resisted by one of the parties, on the ground that he was drunk at the time; but it was not pretended that he was made so by the other parties, and no unfair advantage was taken. The agreement was held binding.

Kinchant v. Kinchant, 1 *Brown's Ch. C.* 369, was a family settlement, and was sustained by Justice Gould, who sat for Lord Thurlow. The complaint was, improper influence used by the father; but the court held there was none; and Gould said, if the settlement had been an unreasonable one he would not have sustained it.

These cases go so far as to establish the principle that courts of equity look with a favorable eye upon agreements made to preserve and maintain the peace of families, but only so far as those agreements are fairly obtained. I do not understand that any of these cases go so far, nor have I been able to find a case, except *Frank v. Frank*, *Ch. Ca.* 84, that goes so far as to say that where there is concealment or misrepresentation, the suggestion of what is false, or the suppression of what is true, by either party to an agreement, courts of equity will sustain them, on the ground that they are family agreements; and in many of the cases agreements have been set aside on the ground of mistake or misapprehension, where the agreement itself was grossly inequitable. In *Gee v. Spencer*, 1 *Vernon* 32, a case in Lord Nottingham's time, property was inherited by three sisters, which became involved in a Chancery suit, and the husband of one of the sisters released his interest to the others, in consideration that they would bear the charges of the suit. It was set aside on the ground of misapprehension of the party. And see *Pussey v. Desbouverie*, 3 *Peere Wms.* 315, and *Bingham v. Bingham*, 1 *Vesey* 126.

In reference to the case of *Frank v. Frank*, I have to say, on the authority of Eldon, in 10 *Vesey, Jr.*, 582; Loughborough, in 1 *Henry Blackstone* 332, and Ch. Kent, in 1 *Com.* 492, that Ch. Cases is a book of very indifferent authority; and the case itself

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has seldom been mentioned but with disapprobation. Lord Manners, in *Leonord v. Leonard*, repudiated it altogether.

There is a case in *Eden's Reports* 175, *Wyckerly v. Wyckerly*, decided by Lord Northington in 1763, which has been cited and relied on, where an estate was re-settled upon a family arrangement entered into by father and son upon the son's marriage; but that was an equitable arrangement, entered into upon a full and fair understanding all round. The allegation of undue influence exercised by the father was unsupported; and the Chancellor said if there had been want of consideration or undue means used in procuring it, his decision would have been different.

Applying, then, the principles which I find well settled in the books to the facts of this case, as I understand them, I feel bound to advise his Honor, the Chancellor, to make a decree in conformity with the prayer of the complainant's bill. For, I think the agreement with Rachel Ann and Hannah was, in the first place, inequitable. Upon the principles of this settlement with these two sisters, if it had been extended to Phebe, who was married, and Eunice, who was an infant, the four sisters would have received \$940 each, as their shares, while the son would have taken the balance, being \$4640, of an estate devised to him and his four sisters in equal shares; and it does not help the equity of the agreement, as between Jones and Rachel and Hannah, that Phebe, who had a husband to insist upon her rights, got \$1500, or that Eunice, who was an infant, could not be made a party to it.

In the second place, I think there was some undue means used to procure this agreement. I cannot resist the unfavorable impression made upon my mind by the declarations of the son, repeated on every occasion of difficulty being interposed, that he would sell out his share and go away; that he must have all the land or he would have nothing to do with it. I think the dissatisfaction expressed by him the moment the will was read, and these declarations, so constantly repeated, had at least something to do with producing the ready consent of the sisters to take anything, even \$800, rather than that their only brother, at such a time, should abandon his house and theirs, and leave them to

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manage their share of the estate themselves. He was not so much afraid of debt, I think, as he professed to be, for though by the arrangement he got money securities of the estate to a large amount, he appropriated no part of it to pay his sisters, and he was reluctant to relieve himself from part of Keene's \$1500 by parting with the corner-house and lot, which could have been no essential appendage to a farm of 77 acres; and the very indifference or reluctance he manifested towards becoming the purchaser, was calculated to depreciate, in the view of his sisters, the value of the estate. I see no good reason why he should have been dissatisfied with the will, nor why he could not have managed the land a little while as a tenant in common with his sisters, nor why he should not have told that it could, when Eunice came of age, or possibly before, be sold together, and the proceeds divided; though I do not say that I am so clear about it that I would venture to annul the agreement for this, were it the only point.

But, in the third place, I think there was here both improper concealment and misrepresentation. *Concealment* in this, that he did not, upon first entering on, or in the progress of the negotiation with his sisters, have a fair inventory or valuation of the estate made out and exhibited to them; and *misrepresentation* in this, that in the estimate he and Frost made, they put the personal estate at less than one-third of its true value, and suffered the sisters to act under that mistake. The bill charges him with full knowledge of the estate and its value, and he virtually admits it in his answer.

I feel bound to say, upon authority and upon principle, that where a father devises an estate to a son and daughters, the son knowing its true value, and the daughters not knowing it, the son, when he enters into a treaty with them for a different settlement and disposition of that estate, should be scrupulously careful to apprise them fully of its value, of their rights, and of every circumstance necessary to enable them to treat upon terms of perfect equality; and that concealment or misrepresentation, or any conduct on his part calculated to put them at a disadvantage in the negotiation, will be fatal to the contract, if a court of equity should come to deal with it.

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The doctrine "*caveat emptor*" does not apply in such a case, because it will always be presumed, unless the contrary appear, that the sisters repose confidence in a brother.

This disposes of the case, without going into the question of Hannah's capacity to contract, or how far, if she was shown to be incapable, the court would interfere for the benefit of the heirs. All the objections to the contract made with Rachel apply with still greater force to that made with Hannah. She seems merely to have acquiesced, with little or no inquiry, in what the others did, and if she exercised any reflection or judgment about it, I see no evidence of it in the case.

I shall advise his Honor, the Chancellor, to decree that the releases executed by Rachel and Hannah be delivered up to be canceled, and that thereupon the bond held by Rachel be surrendered; and that Rachel and the heirs of Hannah be let in to their shares under the will of the testator, and that a proper account be taken under the order of the court.

REVERSED, 2 Hal. Ch. 631.

ANN P. WHITE ET AL. v. WILLIAM WHITE, CHARLES S. OLDEN AND STACY A. PAXSON, EXECUTORS, &c., OF SAMUEL S. OLDEN.

The will first gave A. P. W. the sum of \$10,000, and then gave a number of pecuniary legacies, and certain specific legacies. Then followed this clause: "My bank stock I wish to make a part of A. P. W.'s legacy, as they will give her less trouble in collecting." The will then gave certain other specific legacies, and gave all the remainder of his property to four consins. Then followed this clause: "I wish that the house I have lately purchased of C. M. C., valued at \$4000, be a part of my dear aunt's (A. P. W.'s) legacy, and that in the division of her portion, my Trenton Bank stock be calculated at \$40 per share, and the Easton Bank stock at \$30 per share." The personal estate was insufficient to pay the pecuniary legacies in full. Held, that A. P. W. took the house and lot and the bank stock at the valuations thereof, respectively, given by the will, without being subject to abatement.

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Samuel S. Olden, late of the county of Mercer, in this state, died on the 5th day of June, 1841, leaving a will, dated February 8th, 1841, by which he bequeathed to his "dear aunt, Ann P. White, who, since she has had the charge of us, has acted the part of a kind and devoted mother, the sum of \$10,000, to be paid to her as soon as practicable after my decease, or with interest from that time." The will then gave a number of pecuniary legacies and certain specific legacies. Then follows this clause: "My bank stock I wish to make a part of my dear aunt's legacy, as they will give less trouble in collecting." The will then gives certain other specific legacies; and then gives all the remainder of his property, both real and personal, to be equally divided among his four cousins, Job, Robert, George and John White. Then follows this clause: "I wish that the house I have lately purchased of C. M. Campbell, valued at \$4000, be a part of my dear aunt's legacy; and that in the division of her portion, my Trenton Bank be calculated at \$40 per share, and the Easton Bank at \$30 per share." He then appoints his cousin, William White, and friends, Charles S. Olden and Stacy A. Paxson, executors of the will. By a codicil to his said will, dated May 28th, 1841, he gave and devised to his aunt, Ann P. White, in fee, a lot of woodland of fifteen acres, and all the provisions, and the vessels containing the same, that might be in the house where he resided, two pigs, one cow, and all the plate in his house; and then gave three other small pecuniary legacies.

The bill states that, in addition to the house and lot directed by the will to be made a part of Ann P. White's legacy, and the lot of woodland mentioned in the will, the testator died seized of a very considerable real estate, consisting of two large and valuable farms, in the said county of Mercer, and that Job White, Robert White, George White and John White, to whom the remainder of the testator's property was given, after his death took possession of the same.

The bill is exhibited by Ann P. White and other legatees, against the executors and the residuary devisees, and prays an account of the personal estate and of the debts of the testator, and an account of the rents and profits of the real estate taken

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possession of by the residuary devisees; and that the complainants may be paid the full amount of their respective legacies, out of the personal estate, if that be sufficient for the purpose, and if not, then that a sufficient part of the real estate in possession of the residuary legatees may be sold, in aid of the personal estate, to pay the legacies; or that the debts be paid out of the real estate, and the legacies be paid out of the personal estate.

A demurrer was filed to this bill, by the residuary devisees; and the executors of the will put in an answer to the bill. Job White afterwards died, leaving a will, devising all his real estate to Benjamin C. White, Elizabeth T. White and Martha Ann White; and thereupon a bill of revivor and supplement was filed, making the said devisees of Job White parties to the suit.

The cause was heard on the demurrer, and a decree made therein by the Court of Chancery, on the 11th of July, 1843, from which an appeal was taken to the Court of Errors and Appeals.

In May, 1846, in conformity with the decree of the Court of Errors and Appeals, it was ordered by the court that the demurrer be allowed, and that the bill, so far as it related to the residuary devisees, be dismissed.

In September, 1846, by consent of the solicitor for the complainants and the solicitor for the executors of the will, an order was made referring it to a master of this court to take and state an account of the personal estate not specifically bequeathed, and of the debts and funeral and testamentary expenses, and of the legacies and the amounts due thereon, respectively; and that if the personal estate not specifically bequeathed should be found insufficient to pay the legacies in full, the legacies should abate, giving the master liberty to state any special circumstances, and reserving all further equity and directions until after the master shall have made his report.

On the 1st of March, 1847, the master's report came in. The master reported that the personal estate not specifically bequeathed amounts to \$37,963,65½; that the debts and funeral and testamentary expenses amount to \$13,111.01; leaving a balance of assets in the hands of the executors of \$24,852.64; that the legacies given by the will and codicil amount to \$33,325; that

of the assets in the hands of the executors, \$1847 consists of securities and stock not yet realized, and the value of which is uncertain, and that the last-mentioned sum should be deducted, to show the amount now in hand for distribution, leaving the said securities and stock to be hereafter accounted for. That after making the said deduction, the amount now on hand for distribution is \$22,995.64. The master reports that all the said legacies are liable to abatement, and that an abatement of 31 per cent. is necessary to the present settlement, which will leave \$1858.39 of money and securities in the hands of the executors to be accounted for hereafter. And the master gives, in a schedule annexed to his report, a statement of the sums to be paid to the legatees, respectively, on the principle adopted by him for distributing the amount now to be distributed among the legatees.

By the said schedule, the amount given by the will to Ann P. White, (being \$10,000,) is made to abate \$3100; and the master reports the amount now to be paid to her to be \$6900. The amounts to be now paid on all the other legacies, respectively, are ascertained by making a like abatement on each.

Exceptions to this report were filed in behalf of Ann P. White.

The first exception is, that the master has reported that the legacy of \$10,000 to Ann P. White, and which the will directs should be paid to her, in part, by the house and lot he purchased of C. M. Campbell, valued at \$4000, and in part by his bank stock in the Trenton Bank and in the Easton Bank, at certain prices or valuations named in the will, is subject to abatement in common with the other legacies: whereas the said legacy is either a specific or a demonstrative legacy, and not a general or pecuniary legacy, and therefore not subject to abatement in common with the pecuniary legacies.

The second exception is: For that the testator, though he first gave the said Ann P. White a pecuniary legacy of \$10,000, yet that, in subsequent parts of his will, he altered and modified the said bequest by giving and devising to her, specifically, in lieu of so much of said sum, certain real estate in the will named, at the price or value of \$4000; and also his stock in the Trenton

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Bank at \$40 a share, and his stock in the Easton Bank, at \$30 a share; and that the master has subjected the whole \$10,000, of which the property above mentioned and specifically given, at specific values, were to constitute a part, to abatement, in common with the pecuniary legacies.

The third exception is: Because, if any part of the \$10,000 is subject to abatement, it is only so much thereof as would remain to be paid in money, after deducting therefrom the said house and lot at \$4000, and the said bank stocks, at the values per share mentioned in the will; whereas the master has reported that the whole sum of \$10,000 is subject to abatement.

The cause was heard on these exceptions.

Jos. C. Hornblower and *J. P. Bradley*, in support of the exceptions.

They cited 3 *Dessau*. 386-7; 7 *Ves., Jr.*, 529, 530; 1 *P. Wms.* 403, 777; 18 *Ves., Jr.*, 463; *Ib.* 146, 15; *Ib.* 384, 389; 1 *Bevan's Cond. Ch. Rep.* 405; 1 *Keene's Rep.* 210, 410; 4 *Ves., Jr.*, 157; 1 *Roper on Legacies* 150, 1, 2, 3, 5, 163, 4, 6, 173, 7, 181, 3, 255; 2 *Wms. on Ex'rs* 740, 2, 3, 5, 6, 842; 2 *Ves.* 561, 4; *Finch Rep.* 303; *Thos. Raym.* 335; 2 *P. Wms.* 328, 469; *Ambler* 310; 2 *Ves.* 640; 4 *Ib.* 150, 555, 750; 5 *Ib.* 199; 11 *Ib.* 607; 5 *Ves. & Beam* 2; 1 *Meriv.* 178; 2 *Mad. Rep.* 223; 2 *Sim. & Stuart* 354; 3 *Eng. Cond. Ch.* 194; 2 *Young & Col.* 90; 7 *John. Ch. Rep.* 258; 1 *Dessau.* 202; 3 *Ib.* 369.

P. D. Vroom, contra.

THE CHANCELLOR. The testator first gives to his aunt, Ann P. White, (who, he says, has acted the part of a kind and devoted mother,) the sum of \$10,000, to be paid to her as soon as practicable after his decease, or with interest from that time, and then gives a number of pecuniary legacies, and certain specific legacies. Then follows this clause: "My bank stock I wish to make a part of my dear aunt's legacy, as they will give her less trouble in collecting." He then gives certain other specific legacies, and gives all the remainder of his property, real and personal, to his four cousins, Job, Robert, George and John

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White. Then follows this clause: "I wish that the house I have lately purchased of C. M. Campbell, valued at \$4000, be a part of my dear aunt's legacy, and that in the division of her portion, my Trenton Bank be calculated at \$40 per share, and my Easton Bank at \$30 per share."

By a codicil to his will he gives to his aunt, Ann P. White, in fee, a lot of woodland, of fifteen acres, and all the provisions, and vessels containing the same, that might be in the house where he resided; two pigs, one cow, and all the plate in his house; and then gives three other small pecuniary legacies:

The personal estate, after paying the debts and funeral and testamentary expenses, is insufficient to pay the pecuniary legacies in full.

The master has reported that, under the several clauses of the will in favor of Ann P. White, above stated, the gifts made to her should be considered in the light of a pecuniary legacy of \$10,000, and should be subject to an abatement, on that sum, ratably with the other pecuniary legacies; which abatement would reduce what she is to receive to \$6900; and that she should take the Campbell house and lot as \$4000 of this \$6900, and the bank stock, at the valuations fixed thereon by the testator in his will, as so much more of this \$6900. The Trenton Bank stock is appraised, in the inventory, at \$30 a share, instead of \$40, the valuation fixed thereon by the will; and the Easton Bank stock is appraised at \$30 a share, the same as the valuation thereof fixed by the will.

I agree with the master that, under the before-stated clauses of this will, Ann P. White is to take the Campbell house and lot at \$4000, and the bank stock at the valuations thereof fixed by the will, as part of the \$10,000 mentioned in the first of the said clauses. But the master has come to the conclusion on the question of abatement to which I have not been able to assent.

As to the house and lot, it seems clear to me that the principle adopted by the master would not be just or reasonable. By the first of these clauses, the testator had given to A. P. White a pecuniary legacy of \$10,000. If he had made no change in this respect, the ratable proportion of this whole sum would

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have been taken from the personal estate, and the other pecuniary legatees would have received proportionably smaller dividends on the legacies to them. The testator afterwards gives her a house and lot, at a fixed value, as part of, that is, instead of so much of the \$10,000. This relieves the personal estate of so much of the \$10,000 to the benefit, to that extent, of the pecuniary legatees. I cannot see with what propriety the pecuniary legatees can claim that this house and lot, or the value at which it was given to her by the testator, in relief of the personal estate, to that extent, in favor of the legatees out of the personal estate, shall be subject to abatement. If he had given her a house and lot valued at \$10,000, instead of the said legacy, it would not be claimed that the house, or the value thereof, was subject to abatement. By what rule can it be claimed that a house and lot given instead of part of said legacy, must abate? The principle might lead to strange consequences. If an abatement of 75, instead of 31 per cent. had been necessary, A. P. White, on the principle adopted by the master, would have been obliged to pay \$1500 to get a house and lot *given* her by the testator.

As to the bank stock, I am of opinion, also, that neither the stock nor the amount of the valuation thereof is subject to abatement. I will not enter upon a review of the numerous decisions on the subject of specific and demonstrative legacies. No case was cited, nor have I found any that affords much aid in the consideration of the question discussed as arising under this will.

The will bequeaths to Ann P. White the stock. This is so considered by the master; for he gives it to her; and that, at the valuation fixed by the testator, though the appraised value of a part of it is \$10 less per share. The argument in favor of the report is that the stock, or the testator's valuation of it, should be subject to abatement, because it is given as part of the \$10,000 given as a pecuniary legacy in a former part of the will. In my view, we are to read the will according to the idea or intention the testator must be supposed to have had when the subsequent provisions of it in favor of Ann P. White were made. Clearly a new and different idea prevailed with him, at this point

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of time, from that which he had when the first clause was dictated, giving her a money legacy of \$10,000. At this point of time, he certainly intended to give, and did give to her the house and lot and the bank stock; and his calling them a part of her legacy of \$10,000 was simply because he had at first intended to give, and given her a money legacy of that amount.

We can hardly suppose that if the last intention had existed at the time he gave the pecuniary legacy of \$10,000, the language of the will would have been the same it now is. It can hardly be supposed he would have begun by saying "I give Ann P. White the sum of \$10,000." But if he had, and had then immediately added that he gave her the house and lot as part of it, and his bank stock, at fixed valuations, as another part of it, would it be any the less a gift to her of the house and the bank stock?

The report of the master must be corrected in these particulars.

Order accordingly.

JAMES L. WILSON AND PETER DAVISON, ADMINISTRATORS
DE BONIS NON WITH THE WILL OF FERDINAND SHIBLA
ANNEXED, v. MILTON ELY, SURVIVING ADMINISTRATOR,
&c., OF JOHN ELY.

1. F. S. devised and bequeathed to his wife, D., the use of all his estate during her life; and directed that after her death, the estate should be sold, and the proceeds divided among certain persons named in the will. The widow, D. was sole acting executrix of the will. She afterwards married J. E., who received from her, at different times, moneys belonging to the estate of F. S., deceased, and gave receipts therefor as moneys of the said estate. *Held*, that D.'s being entitled to the use of the moneys during her life, did not destroy the trust character in which she, as executrix, held the money, and that J. E. was bound by the same trust.

2. Trusts are enforced against one who comes into possession of the property bound by the trust, with notice of the trust.

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3. The statute of limitations does not run against trusts.

4. The presenting, by a complainant in chancery, to the administrator of an estate, a claim for which the intestate was bound as trustee, is no reason why the suit in this court to enforce the trust should not proceed.

Ferdinand Shibla died March 25th, 1827, leaving a will, by which he gave, devised and bequeathed to his wife, Deborah, the use and enjoyment of all his estate, real and personal, during her natural life; and directed that after her decease, all the rest and residue of his estate, both real and personal, should be sold, and the proceeds thereof, together with all other estate he might be entitled to on debts to be received or otherwise, should be divided among certain persons in the will named; and appointed his said wife and John I. Little executors of his will. The widow alone proved the will and acted as executor. The inventory of the personal estate of the testator amounted to \$1304.40; it was not exhibited in the cause; and it did not appear of what the personal property consisted. On the 11th of February, 1840, the widow intermarried with John Ely.

The bill charges that he, in right of his wife, possessed himself of the whole of the said real and personal estate of the testator. After the marriage, Ely gave to his wife, the said Deborah, the following receipts or certificates: one, dated April 1st, 1830, by which he acknowledges to have received from her \$100, "the money of her former husband;" one dated May 27th, 1830, for \$53, "being moneys of her former husband;" one dated April 8th, 1831, for \$400, "being moneys of her former husband, which said moneys is to be paid to her for her said use;" one dated February 23d, 1832, as follows: "I have in keeping of my wife, money of her former husband, \$212."

John Ely died October 20th, 1830, intestate, leaving the said Deborah him surviving.

Milton Ely, the defendant, is the surviving administrator of the said John Ely, deceased. Deborah Ely died intestate, August 10th, 1842. The complainants are the administrators *de bonis non*, with the will of Ferdinand Shibla annexed.

The bill prays that the defendant, Milton Ely, surviving administrator of John Ely, deceased, may be decreed to account for the personal estate of the testator, Ferdinand Shibla, which

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came to the possession of said John Ely and Deborah his wife, or either of them, and for the rents and profits of the said real estate.

The answer says that the defendant is informed and believes that the money for which the said certificates were given, together with about \$40 included in a note given by Jeremiah Newman to the said John Ely, by the advice and consent of the said Deborah, is the whole amount of moneys which the said John Ely received of the estate of the said testator, F. Shibla, for all which sums he accounted to the said Deborah, as the defendant is informed and believes.

The answer denies that John Ely, from his marriage to his death, or at any time during his life, occupied the real estate of the said testator, or received the rents and profits thereof and converted the same to his own use. The defendant submits to act in the premises under the direction and indemnity of the court.

The answer sets up the statute of limitations, and also that there is a defence at law.

By a supplemental answer, the defendant says that, under an order of the Orphans' Court of Monmouth, he has sold all the estate of John Ely, deceased, real and personal; that among the claims presented to him against the estate of John Ely, deceased, is the demand of the complainants in this cause, and that the settlement of this claim, as well as others, is now pending undetermined in said Orphans' Court, and that he is satisfied, and therefore charges, that the estate of said John Ely, deceased, is insolvent.

D. B. Ryall, for complainants. He cited 3 *Johns. Ch.* 190; 4 *Ib.* 136; 1 *Ib.* 52, 119; 10 *Johns. Rep.* 495.

Wm. L. Dayton, for defendant.

THE CHANCELLOR. The receipts or certificates given by John Ely to his wife, show that the moneys therein stated to have been received by him from her, were the moneys of the estate of the testator, Ferdinand Shibla. Deborah, the wife of

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Ely, was the executrix of Shibla's will, and as such, held this money in trust. Her being by the will entitled to the use of it during her life, does not destroy the trust character in which she, as executrix, held the money. John Ely, her second husband, having, after his intermarriage with her, received a part of this money, was bound by the same trust. *Scho. and Lef.* 270. He must be held to have become possessed in right of his wife of such of the assets of the testator of whose will she was executrix as he received from her, and as husband of the executrix, he was rightfully possessed; the money was in the hands of both as trustees. And if this was not so, trusts are enforced, not only against him who is rightfully possessed of the trust property as trustee, but also against one who comes into possession of the property bound by the trust with notice of the trust. *Ib.* 262. And on his death his assets are chargeable in equity for the money so received by him. *Ib.* 243, 265-6, 272.

This disposes of all the grounds of defence set up in the answers except one. It disposes of the statute of limitations, for it does not run against trusts; it disposes of the defence that the remedy is at law, for all trusts are cognizable here; it disposes of the defence set up in the supplemental answer, that this claim has been presented to the defendant, as surviving administrator of Ely, under an order of the Orphans' Court limiting the creditors of John Ely, deceased, and is pending undetermined in that court. By an order of that court, the creditors of John Ely, deceased, were limited to a certain time within which to present their claims, under oath, to the administrator of his estate, the defendant in this suit. This could not oust the jurisdiction of this court, nor does the fact that the complainants in this case, in pursuance of the said order and in compliance therewith, presented this claim. It was certainly prudent that they should do so. But this is the proper tribunal for the settling of the questions arising in this case.

Another ground of defence is taken in the answer. The defendant says he is informed and believes that John Ely, in his lifetime, accounted with his wife, the executrix of Ferdinand Shibla, deceased, for the moneys he so received of her.

If an executrix or administratrix marries and the goods of her

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testator or intestate come into the actual possession of the husband and are wasted during the coverture, there can be no doubt the husband is liable, and on his death his assets are chargeable in equity. The executrix surviving would also be liable, if the assets of the husband proved insufficient. It is unnecessary to say, in this case, whether the assets of the husband, after his decease, would be liable if he, in his lifetime, replaced the moneys or goods in the hands of the wife, the executrix, in case they were afterwards wasted by her. It is sufficient for present purposes in this case, to say that, if he replaced the money in her hands, and it was not wasted, but remained in her hands, or has since her death come into the hands of her personal representative, it would be just and equitable towards the estate of her second husband, and the creditors of that estate, to charge, in the first place, the estate of the deceased executrix in the hands of her administrator. But how can I, in this cause, and between these parties, declare and decree that the moneys were repaid by John Ely to his wife? Her administrator is not before the court. The decree in this cause, that he had repaid, could be no foundation for a suit in which to charge her estate. The complainants, then, are here with the suit in such position as to parties, that it cannot be settled in favor of the estate of John Ely, even if the proof, as now made between the parties, were entirely satisfactory that Ely repaid. If the administrator of Deborah Ely had been made a party, he might have been able satisfactorily to resist the allegation of repayment, and thus show, at least, that Ely's estate should be first resorted to.

On the other hand, if it was entirely clear that John Ely did not replace the moneys, I do not understand that the complainants here would be entitled to any preference out of his estate over other creditors; and if they were, his whole estate might be insufficient to pay this claim, in which event, as beforesaid, the assets of the wife's estate would be answerable for the residue; and thus two suits would be necessary before an end of this matter could be reached.

No demurrer was filed to the bill, and therefore it should not be dismissed. I think the case should stand over that the proper parties may be made defendants.

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As to the question whether John Ely replaced these moneys, any result the court might come to on the evidence now before it would be little better than conjecture; and the case shows that more light might have been furnished to the court on the subject. By the course which I have suggested as proper to be taken, an opportunity will be afforded for additional proof on this subject.

JAMES S. STURGES AND THOMAS T. STURGES v. JACOB ALYEA.

1. A. and J. had given a joint bond, and A. had given a mortgage to secure it. Afterwards A., "in consideration of certain agreements entered into between him and J.," gave his bond to J., assuming the payment of the first bond, and indemnifying J. against it. After A. had paid half of the first bond, J. paid the other half of it, and instead of having it canceled, induced the obligee to assign it to S. and S., for the purpose of having the mortgage given by A. to secure it foreclosed in their names; and a foreclosure suit was brought in their names.

2. The court ordered the bill to be dismissed.

The bill states that on the 24th of August, 1840, Jacob Alyea and Thomas V. Johnson became indebted to Andrew B. Haxton, of New York, in \$2564.26, and to secure the same, gave to Haxton their bond of that date, conditioned for the payment of the said sum in two years, with interest payable semi-annually; and that Alyea, to secure the payment of the said money and interest, gave a mortgage of the same date, to Haxton, of certain real estate described in the bill, conditioned that if the said Alyea and Johnson should pay the said sum of money and interest according to the condition of the said bond, the mortgage should be void. That the mortgage was acknowledged on the 19th of October, 1840, and recorded the next day. That on the 22d of May, 1845, Haxton, in consideration of \$1, to him paid by the complainants, by deed of assignment assigned the said bond and mortgage to the complainants. That the in-

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terest has been paid up to September 9th, 1844, and that \$1000 of the principal has been paid, and that the residue of the said sum remains due.

The bill is for the foreclosure of the mortgage and sale of the premises.

Alyea alone is made defendant.

Alyea, by his answer, admits that on the 24th of August, 1840, he and Johnson became jointly indebted to Haxton in the said sum, and gave their bond as stated in the bill, and admits that he gave the mortgage mentioned in the bill, and that the mortgage was given by him as well for the benefit of Johnson as for his benefit, and that it was given at the special instance and request of Johnson. He admits the payments mentioned in the bill, but says that they were made by him solely, no part thereof having been paid or the money furnished by Johnson. He admits that Haxton may, in form, have executed an assignment of the bond and mortgage to the complainants, for the nominal consideration of \$1, but he denies that it was made for proper and lawful purposes, and that the complainants were the lawful and *bona fide* purchasers of the mortgage for a valuable and good consideration; and says that the assignment was a fraudulent device of Johnson and the complainants, for the purpose of defrauding him and depriving him of his legal and equitable rights.

He says that at the time when the assignment bears date, Haxton received from Johnson, one of the joint obligors in the bond, the full amount of the balance due thereon, and that the same was paid off and liquidated and fully satisfied, and that if the bond and mortgage were assigned, they were not assigned to the complainants as *bona fide* purchasers, and not until after the whole amount of money due thereon had been paid, namely, the amount herein before stated as paid by the defendant, and the balance by Johnson, the other obligor. That he is informed and believes, that in the transfer of the said bond and mortgage, Haxton did not know the complainants, and that the assignment was procured and dictated by Johnson, and was made by Haxton on his receiving from Johnson, one of the obligors, the full amount due thereon; and that the money was received by Haxton in payment, and not as a consideration for the transfer

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to the complainants. That there is nothing due on the bond and mortgage—the same having been paid off—and that they ought, in equity, to be delivered up and canceled.

Testimony was taken.

L. C. Grover, for complainants.

S. R. Grover, for defendant.

THE CHANCELLOR. The testimony shows that this bond was given by Alyea and Johnson, to Haxton, for a debt for which they were jointly liable, and of which, as between themselves, each was to pay one half, and that the mortgage given by Alyea alone, on property belonging to him individually, was given to secure the said joint debt. The condition of the mortgage is, that if Alyea and Johnson shall pay to Haxton the sum mentioned in the said joint bond, and the interest thereon, the mortgage shall be void. Alyea, before the alleged assignment by Haxton to the complainants, had paid, of principal and interest on the joint bond, \$1615.40. At the time of the alleged assignment, there remained due on the bond, for principal and interest, \$1634.65. I have no doubt, from the testimony, that this balance, being about half the sum secured by the joint bond and the said mortgage, was in fact paid by Johnson, and that the procuring an assignment to be made by Haxton to the complainants was a device of Johnson. The case, then, thus far, is the same as if Johnson, on the payment of his half of the joint bond, had taken an assignment of the bond and mortgage to himself. If he had done so, it will not be claimed that the bond and mortgage would be valid securities in his hands for the amount so paid by him.

It seems that after the giving of the bond and mortgage, to wit, on the 28th of April, 1841, Alyea gave to Johnson a bond, in the penal sum of \$5126.52, the condition of which recites the giving of the said joint bond by Alyea and Johnson to Haxton and the said mortgage by Alyea to secure the payment thereof; and provides that, in consideration of "certain agreements entered into between the said Thomas V. Johnson and the said

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Jacob Alyea," and of one dollar paid by Johnson to Alyea, the said Alyea assumes the payment of the said bond, excepting six months interest thereon which Johnson is to pay; and that Alyea exonerates Johnson from the payment of the said bond; and that if Alyea shall indemnify and save harmless the said Johnson, in manner aforesaid, this bond shall be void.

I presume that Johnson has derived from this bond of indemnity an argument in favor of his course in reference to the assignment procured by him of the bond and mortgage. But it cannot help him or the complainants in this suit. If he supposed he had any equity growing out of this part of the case, to have the mortgage considered a security in his favor for the sum he paid, he should have presented it for the consideration of the court by a bill, which would have enabled the court to judge of it, and to decide whether such relief could be given to him. If such a bill could be entertained at all, it is obvious that the equity involved in it might be overcome by circumstances which might be shown by Alyea in such a suit. To allow Johnson to succeed in the course he has taken would be to allow him to be the judge in his own cause, and to deprive Alyea of all opportunity to resist or overcome the supposed equity on which Johnson has acted.

The bill must be dismissed.

Order accordingly.

REUBEN ROCKWELL AND AZARIAH LEE v. JAMES S. LAWRENCE ET AL.

1. The court will not make a decree for the specific performance of what it can merely infer with uncertainty was the agreement in the case.

2. It is within the jurisdiction of the court, on denying specific performance of an agreement to sell lands, in a suit by the person contracting to buy, and who thereupon went into possession, to order compensation to be made by the party contracting to sell, for what the party contracting to buy had done and paid towards fulfilling the contract.

—

In this case, on the filing of the bill, which is a bill for the specific performance of an agreement to sell a tract of timber land of which the complainants had gone into possession under the agreement to buy it, an injunction had been granted to restrain the prosecution of an ejectment brought by a grantee of the defendants who entered into the agreement to sell, to recover possession of the land. The injunction was dissolved in June, 1845, and these complainants have since been ejected. See *ante*, Vol. I., page 20. An abstract of the bill and answer is there given.

The cause was now brought to a hearing on the testimony.

D. B. Ryall and *G. D. Wall*, for complainants. They cited 2 *Story's Eq.*, § 794, &c.; 9 *Cranch* 493-4; 1 *P. Wms.* 570.

Peter Vredenburg and *W. L. Dayton*, for the defendants. They cited 2 *Story's Eq.*, §§ 762, 764.

THE CHANCELLOR. From a careful examination of the pleadings and proofs, I am of opinion that the complainants commenced and continued their cutting and coaling, and put up the cabins which they erected on the tract, under an agreement for the purchase of it, at a stipulated price, to be paid by appropriating a certain portion of the proceeds of the sale of coal, agreed

Rockwell and Lee v. Lawrence and Wykoff.

upon between the parties, for that purpose. And I think that such portion was to be paid on the receipt by the complainants of the proceeds of the coal sold by them, deducting the freight the first year, and after that without deducting the freight. The deed was to be delivered when the whole purchase money was paid. Beyond this there is much uncertainty whether or not there were stipulations as to how much the payments should amount to within defined periods.

That the stipulated portions of the proceeds of the sale of coal were not paid, or not paid as soon as received, might not be an insuperable objection to decreeing performance. But from the peculiar nature of the agreement, and the consideration that if the complainants should be put into possession of the property for the purpose of enabling them to go on and fulfill the contract, it might subject the defendants to the loss of the timber on their property, or a considerable portion of it, by the failure of the complainants to apply the stipulated portion of the proceeds, I think it would not be an exercise of sound discretion for the court to make a decree for the specific performance of what it might conclude, but with no certainty, was the agreement in this case.

On the other hand, I am of opinion that in this case there should be a reference to a master to state an account between the parties, under the proper directions, for the purpose of ascertaining whether any, and how much compensation should be made to the complainants, in view of what they had done and paid when they were stopped in their operations. I have examined the authorities on this question of compensation, and have no doubt that, in a case like this, it is within the jurisdiction of the court, and its duty to see that what is just between the parties, under the circumstances, be done.

Order accordingly.

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CATHARINE VANDERHOOF v. JOHN CLAYTON AND ELIAS C. CLAYTON.

1. C. H. received a certificate for a pension for five years, commencing from March 4th, 1836, at the rate of \$310 a year. E. C. C. acted for her in procuring the pension; but, for reasons stated, the power of attorney to draw the pension was given to J. C., and J. C. about the 6th March, 1839, received, for the pension money then due, \$931.98. C. H. had lived a number of years with J. C., in his family. On the 8th March, 1839, C. H. signed a receipt, by which she acknowledged to have received from E. C. C. \$931.98, in full of her pension up to March 4th, 1839, obtained by him for her, excepting \$430, which she had agreed to give him for his services in obtaining the pension for her and paying the expenses. C. H. died February 18th, 1841, having continued to live with J. C. until her death, leaving a will, dated February 10th, 1841, by which she gave to her daughter, C. V., "all her property and possession, whether real or personal, and also the amount of her pension which might be due at her death," and appointed E. C. C. executor of her will. *Held*, first, under the circumstances, that the \$931.98, received in March, 1839, could not be considered as belonging to C. H. at the date of the will. Second, that E. C. C. was entitled to retain the \$430, and that it was not a case within the act of congress in reference to agreements before pensions are obtained.

2. Matter set up in avoidance must be proved.

In 1839, Catharine Hartshorne received a certificate for a pension, for five years, commencing March 4th, 1836, at the rate of \$310 a year. Elias C. Clayton acted for her in procuring the pension; but for reasons which appear in the case, the power of attorney to draw the pension was given to John Clayton; who, about March 6th, 1839, received \$931.98, the amount of the pension then due.

On the 8th March, 1839, Catharine Hartshorne signed a receipt, witnessed by Joseph R. Magee, by which she acknowledged to have received from Elias C. Clayton \$931.98 in full of her pension up to March 4th, 1839, obtained by him for her, excepting \$430, which she had agreed to give him for his services in obtaining the pension for her and paying the expenses.

Catharine Hartshorne died February 18th, 1841, leaving a will, dated February 10th, 1841, by which she gave to her daughter, Catharine Vanderhoof, "all her property and possessions, whether real or personal, and also the amount of her pension which

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might be due at her death ;” and constituted Elias C. Clayton executor of the will, “to take care of all her property, and to receive all the pension money, and, after paying her funeral expenses, to pay the balance to her said daughter, Catharine Vanderhoof.”

The bill is filed by Catharine Vanderhoof against the said John Clayton and Elias Clayton.

The bill states that the complainant has requested the said executor, Elias C. Clayton, who is a son of the said John Clayton, to bring the said John to an account for the moneys received by him for the said Catharine Hartshorne, and has offered to indemnify the said executor against all costs, but that the said executor refuses to do so.

It states that John Clayton has paid over to the said Elias C. Clayton one-half of the pension money so received by him, under pretence of paying him for his services in obtaining the said pension, and that the defendants pretend that the said John is entitled to the other half of the said pension money for the board of the said Catharine ; whereas, the complainant charges that the said Catharine was not indebted to the said John, for board or anything else, she having paid her board to him by permitting him to receive an annuity due her of some \$50 a year, and by her services in the family of the said John ; and the bill charges that the said Elias C. Clayton did not obtain the said pension, nor in any way assist in obtaining it, but that it was obtained by “another person,” and that the only service performed by the said Elias was to employ an agent or attorney to prepare the evidence and the papers for the said Catharine Hartshorne.

The bill prays that the defendants, the said John Clayton and Elias C. Clayton, may be decreed to account for the said pension money.

The defendants put in their joint and several answer, in which the defendant John Clayton admits that the said Catharine Hartshorne constituted him her attorney to receive, for her, her pension, at the several times when it became due, excepting the first amount that was drawn after she received her certificate, and that he received her pension up to September 4th, 1840,

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which amounted to \$465.99, and alleges that when he drew it, he offered it to the said Catharine, and that she requested him to keep it, to pay him for her board, which he did, and considers himself in equity and good conscience entitled to do.

He says that the said Catharine lived with him 18 years; that she was his sister-in-law; that when he took her to live in his family she was destitute and without home; that he clothed her during the whole time she lived with him; that she was aged and infirm, being at her death, 90 years old; that she required, particularly during the latter part of the time, considerable care and attention, and that, on a strict account, she would have been largely indebted to him at her death. He admits he received an annuity of \$40 a year due her, during thirteen years, on account of her board, but says that the same and the part of the pension he received are not sufficient to satisfy him for the board and clothing furnished the said Catharine, and the care and attention bestowed upon her.

The defendant Elias C. Clayton admits that he was requested to permit his name to be used to bring the said John Clayton to an account, but says that he then believed and still believes, that the amount of the pension money which the said John had drawn for the said Catharine, she had paid him for her board and clothing furnished her by the said John, and that there is nothing due from the said John to the estate of the said Catharine Hartshorne, and he says he has paid over to the complainant all the money coming to her from the estate of the said Catharine Hartshorne which has come to his hands, and that he is ready and willing to make a settlement of his accounts as the court shall direct.

The defendants admit the will, and say that by the expression in it "the amount of my pension which may be due at my death," the testatrix meant the amount that might accrue between the last semi-annual payment and the time of her death, and not the whole pension she had received from the time she obtained her pension to the time of her death.

The defendants say that at the time the certificate of pension was received, the defendant Elias was a justice of the peace; that he was, in fact, the attorney of the said Catharine at that

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time, to draw the pension; but that the affidavits of the said Catharine Hartshorne to the power of attorney were taken before him as justice of the peace, and therefore the name of John Clayton was inserted in the power of attorney; and that the said John drew the pension money and handed it to the said Elias.

The defendant, John Clayton, says that he has not paid over any of the said pension money so by him received, except as aforesaid, to the said Elias B. Clayton.

Testimony was taken.

Vredenburg, for the complainant.

D. B. Ryall and *W. L. Dayton*, for the defendants.

THE CHANCELLOR. The first question is, whether, under the will and so much of the testimony as may be considered in connection with it, any more of the pension than that which accrued from September 4th, 1840, to the death of the testatrix, on the 18th of February, 1841, belongs to the estate of the testatrix.

The will gives and bequeaths to the complainant "all my property and possession, whether real or personal, including my wearing apparel, and also the amount of my pension which may be due at my death," and appoints Elias C. Clayton her executor "to take charge of all my property, and to receive all my pension money, and after paying my funeral expenses, to pay the balance to my daughter, Catharine Vanderhoof."

First, under this clause and the proof in the case, can the \$930 received in the spring of 1839, as the pension which had accrued from the period named in the certificate for its commencement, be considered as belonging to her estate, and as passing by the will?

A receipt signed by Catharine Hartshorne, by her mark, witnessed by Joseph R. Magee, dated March 8th, 1839, by which the said Catharine acknowledges to have received from Elias C. Clayton \$931.98, in full of her pension up to March 4th, 1839, obtained by him for her, excepting \$430 which she had agreed

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to give him for his services in obtaining her pension for her and paying her expenses, is exhibited on the part of the defendants.

Magee, the subscribing witness to this receipt, testifies that he was a clerk in the store of Elias C. Clayton, kept a short distance from John Clayton's residence. That Elias C. Clayton wrote the receipt at the store, with the name Catharine Hartshorne thereto, and gave it to the witness and told him to take it to Mrs. Hartshorne and get it signed, and to witness the receipt, saying that he had been up to Col. Clayton's, (the defendant, John Clayton's,) and settled with Mrs. Hartshorne. That he, the witness, took the receipt to Mrs. Hartshorne, and read it to her; that she said it was all right, or she expected it was right, witness don't remember which, and signed her mark to it, and he witnessed it. His impression is, that Col. John Clayton was by when he took the receipt to Mrs. Hartshorne.

On cross-examination, he says that when he went to her with the receipt, he did not take any money to her, and that he did not see any money paid to her.

On the 10th February, 1841, nearly two years after this receipt, Catharine Hartshorne made her will, containing the clause above stated. I am of opinion that the will confirms this receipt, and excludes the idea that the testatrix, at the making of the will, contemplated that anything was due to her from any person for pension money accrued due at the date of that receipt. We are not at liberty to suppose that she did not remember the giving of that receipt. She must be supposed to have known, when she signed the receipt, and when she made her will, whether she actually received the money which, from the terms of the receipt, it would appear that she had received. It may be that when she signed the receipt, John Clayton had received from her, or from Elias, the amount named in it, except the \$430, which she allowed Elias to retain. But if it be so, the fact of her giving the receipt, and of her taking nothing from John Clayton to show any indebtedness from John Clayton to her, taken in connection with the terms of the will, made nearly two years after, would be sufficient to show that she had given the balance to John Clayton, or paid it to him. And if she was willing to do so, to requite a benefactor, or make what she

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thought a proper compensation for her board, &c., no just complaint can be made against it.

I think these remarks are applicable also to the \$430 which she allowed Elias C. Clayton to retain. He paid \$125 of this \$430 to the attorney he employed to prepare the papers, &c., for obtaining the pension for her. The testatrix made him executor of her will. I am disposed to think that this fact, and the peculiar language of the will, connected with the fact that she had allowed him, after the pension was received, to retain \$430 of it for expenses and his services in obtaining it, should be considered equivalent to a gift of it by the will.

The case does not seem to me to stand on the question, whether, under the act of congress, the court would give effect to any agreement or understanding, before the pension was obtained, that the person obtaining it should be allowed a portion of it for his services. She would certainly be at liberty to give Elias, by will made two years after the pension was received, any portion of the pension money she had received or that was due her, though any agreement before it was obtained to pay him a portion of it when obtained might be void.

John Clayton admits that he received for Catharine Hartshorne the three last semi-annual payments of her pension which became due in her lifetime, amounting to \$465. They became due as follows: September 4th, 1839, \$155; March 4th, 1840, \$155; September 4th, 1840, \$155. He alleges in his answer, that when he drew her pension he offered it to her, and she requested him to keep it, to pay him for her board, which he says he has done.

His saying she requested him to keep it, &c., is matter set up in avoidance, and must be proved. The testimony on this part of the case is that of Sarah Ann Mount.

She says that in the fall of 1839, John Clayton drew her pension, (the semi-annual payment;) that on the next day he offered it to Mrs. Hartshorne, and that she said to him, you know I have been a great deal of trouble to you, and if I live, I do not know how much trouble I may be, and that if it had not been for the pension she could not have made him any satisfaction, and that he might take it and keep it as long as she lived,

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and when she was dead and gone, he might do as he pleased with it. The witness said that Mrs. Hartshorne wished him to keep it for the trouble she had been to him and the trouble she would be.

On cross-examination the witness said that when Col. Clayton offered Mrs. Hartshorne the money, she said in conversation, that he was more capable of taking care of the money than she was, and to keep it.

As to the two other semi-annual installments of the pension received by John Clayton, there is no evidence either of his offering them to Catharine Hartshorne or of her requesting him to keep them.

On this part of the case, I am of opinion that John Clayton's offering her the said installment received by him in the fall of 1839 is sufficient evidence that he did not then consider her in his debt. How it was that he was willing to offer her this money does not, with certainty, appear; but I cannot resist the impression made on my mind by the pleadings, proofs and circumstances, that he got the benefit of the \$930 first drawn, excepting thereout the money which Catharine Hartshorne allowed Elias C. Clayton to retain. If he had not, it can hardly be imagined, in view of the defence set up in the answer, that he would have offered to pay her this \$155. And I do not think that the testimony of Mrs. Mount enables me to say that the answer of Catharine Hartshorne to Col. Clayton amounted to a gift of the \$155.

This part of the case, therefore, turns on the question, whether Catharine Hartshorne's giving, by her will, to her daughter the amount of her pension money which might be due at her death, and directing her executor to take charge of all the property and receive all her pension money, and after paying her funeral expenses, to pay the balance to her daughter, amounts to a gift to Col. Clayton of the \$165 received by him in the last three installments before her death. I do not think it should be so considered. It does not appear that she was ever informed that the two last installments, or either of them, had been drawn by Col. Clayton, and if we ought to presume that a woman of her great age, and in the infirm state in which she appears to have been at

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that time, would be aware that the time for their payment was passed, and could divest ourselves entirely of doubt whether the peculiar language of the will in this respect was really her language; yet it is easy to perceive that money in Col. Clayton's hands, received by him as her pension money, might be considered by her as pension money due her. She had given no receipt for any of it; and as to the last two installments, it does not appear that either of them had ever been offered to her.

I have found this case somewhat difficult to decide; but, on a careful examination of it, I am strongly impressed that John Clayton should be decreed to account for the \$465 received by him in the three last installments of the pension; and that he should be allowed, in that account, reasonable compensation for the maintenance of Catharine Hartshorne from the 8th March, 1839, and to any clothing he may have furnished her after that time.

He cannot be allowed, as against this \$465, any sum for maintenance, &c., prior to that time. Nearly two and a half years elapsed from the death of the testatrix to the filing of the bill in this case, and John Clayton presented no account against the estate of the testatrix to the executor of her will. If he did not receive the residue of the \$931, after the allowance made to Elias out of it, his presenting no account to the executor is, at least, very persuasive to show that he did not consider her estate indebted to him. If he did receive it, the facts show that he considered himself paid. His offering her the next installment must be taken as proof of one or the other.

As to the account of the executor for so much of the assets of the estate as has come to his hands, he proffers himself, in his answer, ready to render such account; and I see no reason why that account should not be settled in this cause.

Order accordingly.

Miller v. Traphagan.

JONATHAN D. MILLER v. CORNELIUS V. TRAPHAGAN.

1. A notice of a motion to dissolve an injunction "for irregularity in the proceedings," is insufficient.

2. The notice should state the irregularity.

Motion to dissolve an injunction. The notice given is that an application would be made to the Chancellor, on the 10th day of July, 1847, at 10 A. M., at his chambers at Newark, to dissolve the injunction granted in the cause, "for irregularity in the proceedings."

Walter Rutherford, for the motion.

Oliver S. Halsted, Jr., and *A. Whitehead* objected that the notice was insufficient.

THE CHANCELLOR. A notice to dissolve an injunction "for irregularity in the proceedings," is insufficient.

The irregularity complained of should be stated in the notice.
2 *Green's Ch.* 9.

Attorney-General, ex rel. Ryerson, v. Corporation of Newark.

THE ATTORNEY-GENERAL, EX RELATIONE VAN BUREN PY-
ERSON, WILLIAM VAN HOOK, AND OTHERS, v. "THE
MAYOR AND COMMON COUNCIL OF THE CITY OF NEW-
ARK," AND JOHN H. STEPHENS.

1. In 1696, the proprietors of the Province of East New Jersey conveyed to four persons of the town of Newark, "all that tract of land allotted for the burying place," (describing it,) "to have, &c., unto the said grantees, their heirs and assigns forever, to the only use of the old settlers of said town, their heirs and assigns forever, to be and remain to and for the uses therein specified; and to be appropriated to no other use or uses whatever." The trustees took possession of the tract, and held it in trust for a burying-place; and it was so used from the date of said conveyance until 1829. In 1798, the inhabitants of Newark were incorporated. In 1804, the legislature passed an act vesting the said trust estate in the corporation, and declaring that the estate thereby vested should be appropriated and forever remain to and for the uses in the said original grant expressed, and for no other use or uses whatever. In 1836, "The Mayor and Common Council of the City of Newark," by the act incorporating the freemen of Newark under that name, became, by the provisions of said act, seized of all the lands, property, &c., of the former corporation, according to such estate and interest therein as the said former corporation had. In 1844, "The Mayor and Common Council" leased a part of the said tract, so allotted for the burying place, to J. H. S.

2. In 1844, an information and bill was filed, praying that the said lease may be set aside, and that the mayor and common council may be decreed to hold the said tract subject to the trusts aforesaid.

3. The defendants pleaded, that by the fundamental constitutions for the said province, established in 1683, it was declared that 14 years' quiet possession should give an unquestionable right to any lands, except in the case of infants, &c.; that the first settlers of Newark had quiet possession of the said tract 14 years, from 1667 to 1695; that said tract was, in 1667, and from that time until 1713, in the quiet possession of the said first settlers, until they were, in 1713, by letters patent from Queen Anne, incorporated by the name of "The Trustees of the Freeholders and Inhabitants of the Township of Newark," and that the said "The Trustees of the Freeholders," &c., were and continued in quiet possession until 1798, when the act was passed incorporating "The Inhabitants of the Township of Newark;" and that the said last-mentioned corporation were in actual possession until 1836, when the act was passed incorporating "The Mayor and Common Council of the City of Newark;" and that the said last-mentioned corporation were then, and ever since, have been in the possession of the said tract.

4. The plea was overruled, and the defendants were ordered to answer.

On the 25th of December, 1844, R. P. Thompson, attorney-general, at and by the relation of Van Buren Ryerson and Wil-

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liam Van Hook, and Richason Buckbee, on behalf of himself and the old settlers of Newark, their heirs and assigns, now being inhabitants of Newark, and of all persons having an interest and title in and to the public trust and uses, &c., exhibited an information and bill, setting forth that Buckbee is an inhabitant of Newark, and owner in fee of lands in Newark, and as such owner and inhabitant and assignee of the old settlers of Newark, has an interest and title in and to the said public trusts and uses set forth in the bill; and that they, the said owners, inhabitants and assigns are too numerous and too difficult to be ascertained to be made parties to this bill and information.

That on the 1st of December, 1696, the proprietors of the Province of East Jersey, by conveyance of that date, signed by Andrew Hamilton, then governor of said province, and by the major part of his council, in consideration of the rents and services therein received, and other good causes and considerations, did give, grant, bargain and sell unto John Curtis, John Treat, Theophilus Pierson and Robert Young, all of the town of Newark, in the county of Essex and province aforesaid, among other lands therein described, "all that small tract allotted for the burying-place, taking in the pond and meeting-house, being seven chains in length and four chains in breadth, bounded west by John Treat, south by John Johuston's, north and east by highways, together with all, &c., to have and to hold the said several tracts, with their appurtenances, unto the said grantees, their heirs and assigns forever, to the only proper use, benefit and behoof of the old settlers of the town of Newark aforesaid, their heirs and assigns forever, in common granted, to be and remain to and for the several uses therein particularly specified, and to be appropriated to no other use or uses whatever; to be holden in free and common socage of them, the said proprietors, their heirs and assigns forever, as of the seigniorship of East Greenwich, yielding and paying therefor, unto them, the said proprietors, their heirs and assigns forever, six pence sterling money of England, for the aforesaid several tracts of land, on every five and twentieth day of March forever thereafter, in lieu and instead of all other services and demands whatsoever;" which instrument was immediately recorded, &c.; and in and by the said deed, all the

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above described premises were to be held subject to the public use thereof by the old settlers of the town of Newark, their heirs and assigns, and for the pious and charitable purpose of a burying-ground, and for the interment of themselves and their respective families forever; and ought to have been, and still ought to be, devoted to the same public uses.

That the said trustees took possession, among other lots, of the lot allotted as aforesaid for a burying-place, and held the same in trust for the purpose in the said deed expressed, to wit for a burying-place, to the only proper use, benefit and behoof of the old settlers of the town of Newark, their heirs and assigns; and that said lot was so used from the date of said instrument till within the last fifteen years; and that a portion of it still remains unoccupied except as such place of burial.

That the inhabitants of Newark were incorporated by an act of the legislature passed February 21st, 1788, by the name of "The Inhabitants of the Township of Newark in the County of Essex."

That on the 15th of February, 1804, all the said trustees being dead, and who the heir of the survivor of them might be, being unknown, the legislature, by an act of that date, enacted that the trust estate so vested in the said four trustees should thenceforth cease and be void, and that thenceforth the estate so vested in the said four trustees should be vested in the "Inhabitants of the Township of Newark in the County of Essex," as incorporated by law, and their successors forever; and they were thereby vested with the legal title to the same as fully as though they had been originally named in the said grant in the place of the said John Curtis, John Treat, Theophilus Pierson and Robert Young, their heirs and assigns; saving, nevertheless, the right or rights of any *bona fide* purchaser or purchasers for a valuable consideration without notice of the said trust of the said Curtis, Treat, Pierson and Young, their heirs and assigns; and by which act it was provided that nothing therein contained should in any way extend to or affect the parsonage lands contained in and particularly described in said grant, and also such parts of the burying-ground described in said grant as had either been leased or sold by the trustees of the First Pres-

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byterian Church in Newark, previous to the 1st of January, 1804; and by which said act it was further enacted that the estate thereby vested in the "Inhabitants of the Township of Newark," as aforesaid, should be appropriated and forever remain to and for the several uses in the said original patent aforesaid expressed, and for no other use or uses whatsoever.

That at the time when the inhabitants of Newark were incorporated as aforesaid, the said township included within its limits a larger tract of country than is now comprehended within the bounds of the city of Newark, incorporated as afterwards mentioned in the bill.

That, from time to time, the legislature have set off portions of the township of Newark, and erected said portions into other townships, with all the privileges, advantages and authorities of townships under the act of February 1st, 1798, incorporating townships.

That, after the setting off of said new township, the premises contained in the said trust deed were contained in the township of Newark, and that the heirs and assigns of the old settlers as aforesaid, being inhabitants of the township of Newark, were entitled to and interested in the same rights and privileges, as far as the said grant is concerned, as they before enjoyed or were entitled to.

That the legislature, by an act of February 29th, 1836, among other things, incorporated the freemen, inhabitants within the limits of the township of Newark as then established, by the name of "The Mayor and Common Council of the City of Newark," and enacted that they and their successors should, by virtue of the said act, be vested with, possess and enjoy all the lands, tenements, hereditaments, property, rights, causes of action and estate whatsoever, both in law and equity, in possession, reversion or remainder, which, at the time of passing said act, were vested in or belonged to the inhabitants of the said township of Newark, in their corporate capacity, as at that time incorporated by the name of "The Inhabitants of the Township of Newark in the County of Essex," according to such estate and interest as the said "The Inhabitants of the Township of Newark in the County of Essex," at the time of the passage of

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the said act, had, or of right ought to have had, in the same. By means whereof, "The Mayor and Common Council of the City of Newark" became and were vested, in fee simple, with all and singular the above-described premises contained in the said trust deed, and held the same, and of right and in discharge of their duty still ought to be vested with and hold the same, subject to the public trust and uses contained and declared in the said trust deed.

That the said mayor and common council, by indenture of lease, dated June 30th, 1836, demised to one D. D. Chandler for the term of ten years, or thereabouts, all that lot described in a certain lease from the mayor, aldermen and common council of the city of Newark to one John H. Stephens, to wit, all those tracts, pieces or parcels of land and premises in the city of Newark (describing them).

That the said Chandler has assigned to John H. Stephens all the right and interest which he had by virtue of the said lease, and that said Stephens now holds the said above-described property by virtue of the said lease and assignment.

That the said mayor and common council, on or about April 12th, 1844, executed to the said John H. Stephens a further lease of the said last-mentioned tracts, pieces or parcels of land, in the words and figures following, to wit, (setting out a lease of the said parcels of land to Stephens, for twenty years from May 1st, 1846, at \$55 a year rent, in quarterly payments, with the privilege of renewals, not exceeding sixty years, on terms stated in the lease, with a covenant for quiet enjoyment for twenty years.)

That the premises described and embraced in the said leases and assignment of lease are part and parcel of the premises described and contained in the said trust deed.

The bill charges that the execution of the said respective leases were breaches of trust; and that the premises thereby leased were diverted from the public and sacred uses to which they were subject in the hands of the lessors, respectively, and which were impressed upon them by the founders thereof, viz., by the grantors of and in the said trust deed. That the tenure by which the said leased premises were held by the mayor and common council of Newark was a matter of common repute, well

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known to the inhabitants of the said city ; that it was not the intention of the legislature in any wise to vary the said public uses, or to deprive the *cestuis que trust* of any of their equitable rights and interests in and to the said premises, and that it was not within the competency of the legislature to divest or deprive them of such rights and interests ; but that the same are protected and guaranteed by the constitution of the United States ; and further, that no alienation or disposition of said premises could be made so as to prejudice the said public use, or otherwise than under the sanction of this court, in case an alienation, under peculiar circumstances, should be provident and advisable ; and the proceeds of such alienation should be reinvested, subject to the like uses and for the benefit of the beneficiaries thereof.

The bill charges that the lessees knew of the public use to which the said premises were subject ; that at the dates of the respective leases there were a great many graves and tombstones on the said premises, and any person buying or leasing the same was thereby put upon inquiry, and must have discovered the purposes to which the said premises were devoted as above set forth.

The bill prays that the premises embraced in the said leases may be declared and decreed to be subject to the public, pious and charitable use for the burial of the dead, as is set forth in the bill, and as the same was impressed upon them by the said proprietors, the founders and grantors in said trust deed ; and that the beneficial rights and interest of the complainant and of those in whose behalf the bill and information are exhibited, may be confirmed and established ; that said leases may be set aside and canceled, and the mayor and common council of the city of Newark be decreed to hold the said premises subject to the trusts, rights and interests as aforesaid ; or that, if it shall appear to the court more equitable and just that the said leases should be sustained, the rents which have accrued and shall hereafter accrue, be applied to the purposes of the said trust, under a scheme to be settled by a master of this court ; that all proper accounts be taken, and the defendants be restrained from all further proceedings to the prejudice of the said trusts and the

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interests or rights of the *cestuis que trust* therein, and for further relief.

Subpoena is prayed against "The Mayor and Common Council of the City of Newark" and John H. Stephens.

The bill is sworn to by Richason Buckbee.

A writing is annexed to the bill, stating that Van Buren Ryerson, one of the relators, has given bond, with satisfactory security, for the payment of costs to the obligees therein named and defendants in the bill, if any, &c., and had delivered the bond to the attorney-general, and that he consents that the bill may be filed at the costs of the said relators. Signed by R. P. Thompson, attorney-general.

A copy of the deed from the proprietors is annexed to the bill.

The defendants put in a joint and several plea, that by the fundamental constitutions for the Province of East New Jersey, and which the defendants aver remained in full force as the law of the land, established, granted, and declared by the four and twenty proprietors of New Jersey, in 1683, it was, among other things, granted and declared that 14 years' quiet possession should give an unquestionable right to any lands, except in case of infants, lunatics, or married women, or persons beyond sea or in prison; and they say that the complainant was not, nor were any of the persons in whose behalf the bill is filed, or under whom they claim, infants, lunatics, married women, or persons beyond sea or in prison, during more than 14 years, to wit, from 1667 to 1695, that the land and premises in the information and bill set forth were held, as the defendants aver, in quiet possession by the first settlers of the tract of land now embraced within the bounds of the city of Newark and of the land and premises in said information and bill described, being part of the same, and they aver that the said old settlers, as tenants in common, did have quiet possession of the said premises 14 years, from 1667 to 1695, that the said premises were in 1667, and from that time until 1713, in the actual quiet possession of the first settlers of Newark, as tenants in common, until the said first settlers and their descendants were, by letters patent granted by Queen Anne, dated April 27th, 1713, incorpora-

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ted by the name of "The Trustees of the Freeholders and Inhabitants of the Township of Newark," and the said "The Trustees, &c.," were and continued in actual quiet possession of said land and premises from 1713 until 1798, when the said "The Trustees, &c.," were, by act of the legislature of New Jersey, passed February 21st, 1798, incorporated by the name of "The Inhabitants of the Township of Newark, in the County of Essex;" and the said "The Inhabitants, &c.," from February 21st, 1798, were in actual possession of the said premises until February 29th, 1836, when, by an act of the legislature of New Jersey, the said "The Inhabitants of the Township of Newark," were incorporated by the name of "The Mayor and Common Council of the City of Newark;" and the said "The Mayor, &c.," were, on the 29th of February, 1836, and ever since have been, and still are in the possession of the said premises; and that the defendants are advised that this suit, and every claim and demand made therein, is barred by the said article in the fundamental constitutions of New Jersey; and thereupon they plead the said article in bar, and pray judgment whether they should be compelled to make any further answer to the bill.

The plea was set down for argument.

No counsel appeared in support of the plea.

W. Halsted moved to overrule the plea.

He said that if there was anything in the provision in the fundamental constitutions for the Province of New Jersey in reference to fourteen years' quiet possession, it did not apply to this case; for the corporation of Newark subsequently accepted the trust and continued to hold under it. But there is nothing in that provision which can affect the case. No title could be acquired against the proprietors by fourteen years' quiet possession. The plea does not allege confirmation by the proprietors. The proprietors put down all other titles, and no other than the proprietors' title was ever recognized in this state.

The plea is that the first settlers held the land in question from 1667 to 1695. Now, the grant from the proprietors, in trust for a burying place, was in 1696, showing that the propri-

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etors did not recognize any other title. The proprietors trace title to the first founders, under the grant from the Duke of York. This is the title under which all lands are held in New Jersey; no other title is recognized in this state.

The plea does not state under whom possession was held. It may mean under the Indian title. But our legislature, in 1703, declared all Indian titles void. 1 *Allison* 1.

The plea does not answer the bill. True, the mayor and common council are in possession, but the plea does not deny that they are in possession as trustees; that is the charge in the bill. A trustee may always say he is in possession.

Again, our legislature, by an act passed February 15th, 1804, enacted that the trust estate vested in the said four trustees, by the said conveyance from the proprietors of December 10th, 1696, should be vested in "The Inhabitants of the Township of Newark, in the County of Essex;" and this act provides, that the estate thereby vested in "The Inhabitants of the Township of Newark," as aforesaid, should be appropriated and forever remain to and for the uses in the original patent aforesaid expressed, and for no other use or uses whatsoever. This act was passed on the application of "The Inhabitants of the Township of Newark, in the County of Essex," and was accepted by them. They are estopped.

The plea should have been accompanied by an answer, and the answer should have denied the charge of the acceptance of the trust under the act of the legislature. *Story's Eq. Pl.*, § 674.

The plea simply says they had possession, without denying the trust.

THE CHANCELLOR. The plea will be overruled, and the defendants be ordered to answer.

Order accordingly.

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SAMUEL JONES v. EBENEZER K. SHERWOOD.

1. A tenant under a written lease for a year, after the expiration of the year, filed a bill praying the specific performance of an alleged parol agreement by the landlord for a lease for a second year, and an injunction restraining proceedings at law, instituted by the landlord, to turn him out of possession. The bill stated that the complainant could make no proof, at law, of the parol agreement, and prayed a discovery of it.

2. The answer denied the alleged parol agreement.

3. The injunction was dissolved, and the bill dismissed.

4. If the answer to a bill for discovery and for injunction against proceedings at law, denies the matters of which discovery is sought, and there is no other ground of equity jurisdiction in the case, the injunction will be dissolved, and the bill dismissed.

The bill states that on March 20th, 1846, the complainant entered into an agreement in writing, with the defendant, to lease from the defendant certain premises containing a grist-mill, saw-mill and two dwelling-houses, for the term of one year, from April 1st, 1846.

That on or about March 25th, 1846, he called on the defendant and requested him to extend the term to three years, when the defendant replied that the complainant might have the premises for the term of three years from the said 1st of April, 1846, on the terms mentioned in the said lease. That the complainant then requested that an agreement in writing should be entered into to that effect, or that the said lease might be altered so as to read for three years, when the defendant replied that the complainant should have the premises for three years, and that it made no difference whether it was in writing or not. That, to the complainant's knowledge or recollection, no person was present at the said conversation.

That, in pursuance of said indenture and of said verbal agreement, the complainant, on or about April 1st, 1846, entered upon the premises and opened a store for the sale of merchandise, and commenced driving the mills, with the understanding and expectation that he had the privilege, by virtue of the said verbal agreement, of holding the premises for three years.

That on the 6th January, 1847, he called on the defendant

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for the purpose of having the said further agreement, or some other additional agreement, reduced to writing, when the defendant, after some conversation on the subject, agreed to rent the premises to the complainant on the same terms mentioned in the indenture of lease, for one year, to commence on the 1st of April, 1847. That the complainant then requested that the term might be for two years instead of one, according to the understanding and agreement made subsequent to the execution of the indenture of lease, when the defendant said he was desirous of selling the premises, and that, if he should receive a satisfactory offer, he would like to have the privilege of doing so, and that, for this reason, he was unwilling to lease them for two years, and at the same time the defendant urged the complainant to purchase the premises. It was, however, finally agreed and arranged between them, that the complainant should have the premises for one year from the 1st of April, 1847, on the terms mentioned in the indenture of lease, without reservation, and also for the year succeeding, to commence on the 1st of April, 1848, if the defendant did not before that time sell or get an opportunity to sell the premises; and it was then also further agreed, that if the defendant before that time, should receive an offer for the premises which he was willing to accept, the defendant was to give the complainant the refusal of the premises at the same price; that, at the time of the said last-mentioned conversation and agreement, the defendant said that he would come up to the residence of the complainant, on or about the said 1st of April, 1847, if the weather and traveling were good, and execute the said new lease; that the complainant does not recollect or know that any person, except it be the wife of the defendant, was present or heard the conversation and agreement above set forth, on the 6th of January, or that he can prove the same.

That on or about March 12th, 1847, the complainant was informed by one Holden that he, Holden, had made a conditional agreement with the defendant for the purchase of the premises, and was to take possession of the same on the 1st of April, 1847, and requested the complainant to give up the possession at that time.

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That the complainant, acting on the faith of the said verbal agreement, made on said 5th of January, 1847, made his arrangements to occupy the premises and drive the mills and continue the store another year; and during the months of January and February, 1847, increased his stock of goods and merchandise, by adding thereto goods of the value of \$700, and also bought about 2000 bushels of grain, of the value of \$1500, a part of which grain was, by contract, not to be delivered till about the 1st of May, 1847, for the purpose of grinding the same in said grist-mill during the summer of 1847; that he has repeatedly applied to the defendant to comply with his said verbal agreement made January 6th, 1847, and execute a lease pursuant thereto.

That the defendant, on or about the 1st of April, 1847, sent a notice to the complainant, requiring him to give up possession of the premises, and informing the complainant that his term had ended, and on or about the 10th of April, 1847, procured a summons to be issued by Robert T. Wilson, Esq., a justice of the peace, against the complainant, under the act entitled, "A supplement to an act concerning landlords and tenants," passed March 4th, 1847, for that, as in said summons is alleged, the complainant holds over, and continues in possession of said premises after the expiration of his term, and after demand and notice in writing given for the delivery of the possession thereof to the defendant, which summons was returnable April 22d, 1847, and summoned the defendant forthwith to remove from the said premises, or show cause on the return day, why the possession should not be delivered to the defendant, and was served on the defendant, and returned, and that, on the return day, the proceedings thereon were adjourned to May 6th, 1847, and that the defendant threatens and intends, in violation of his said agreement, to proceed, under the said act and summons, to turn the complainant out of possession.

That the defendant pretends that sometime in March, 1847, he received an offer from said Holden for the purchase of said premises, for \$4000, and that he informed the complainant of this, and offered the premises to him for that sum, and that the complainant had refused to purchase, and that thereby all verbal

agreements were abrogated ; whereas, the complainant charges that the defendant never informed him that he had been offered \$4000 for the premises, and that he would sell them to the complainant for that sum, or that he, the defendant, had had any offer that he was willing to accept.

That on or about the 19th of March, 1847, the complainant, with one Samuel Willet, called on the defendant, and the complainant then offered to give the defendant \$4000 for the premises, which sum, as it was admitted at that time by the defendant, he had been offered and was willing to accept ; when the defendant said to the complainant he would come up the next week, on Thursday, and give the complainant an answer, which he afterwards declined to do.

The bill prays that the said verbal agreement may be specifically performed, and the defendant be decreed to execute to the complainant a lease of said premises for one year from April 1st, 1847, according to the terms of the said verbal agreement ; the complainant offering to execute a counterpart thereof, and in all other respects to perform his part of the said verbal agreement ; and prays an injunction against the said proceedings at law.

The injunction prayed was allowed on the 2d of June, 1847. The defendant put in his answer.

He admits the indenture of lease set forth in the bill. He says he has no knowledge or information, other than that received from the bill, that the complainant, after the execution of the lease and before he took possession of the premises, was dissatisfied with the terms and conditions of the lease, or that he wished to extend the time thereof.

He denies that the complainant, on or about March 25th, 1846, or at any other time between the day of the execution of the said lease and the day when the complainant took possession of the premises, called on him and requested him to extend the said term to three years, or words to that effect, and that he then replied to the complainant by saying that he, the complainant, might have the said premises, for and upon the same rent and terms as mentioned in the said indenture, for the period of three years, commencing on the 1st of April then next, and that the complainant then requested that the defendant and the complain-

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ant should enter into an agreement in writing to that effect, or that the said indenture might be altered so as to read for the term of three years, instead of one year, when this defendant replied by saying that the complainant should have the premises for the term of three years, and it made no difference whether it was in writing or not, or words to that effect, as is untruly stated in the bill. But, on the contrary, he says that after the execution of the lease, and before the complainant took possession, he held no conversation with the complainant relative to extending the time of the said lease for the period of three years, or for any other period, or relative to altering or changing the terms and conditions of the said lease in any way or manner whatever; nor did this defendant, during that time nor since, make any agreement, verbal or otherwise, with the complainant, to extend the term of the said lease for three years or for any other period.

He denies that he entered under the said verbal agreement as set forth in his bill, or under any other verbal agreement whatever; and he avers and charges that, on the said first of April, he delivered the possession of the premises to the complainant, and the complainant entered thereon, under and by virtue of the said indenture of lease, and for the term of one year only; and that there was no understanding or agreement between the said parties relative to extending the term for which the complainant should hold the premises beyond the time mentioned in said lease; and that the said indenture of lease was, on the day the complainant took possession, in full force and effect, not having been altered, modified or extended by any subsequent agreement or understanding between the parties thereto.

He says that at the time of the execution of the said lease, and from that time forward, he was anxious to sell the premises, and that it was known to the complainant and the neighborhood that the property was in the market for sale; and he avers that if the complainant had applied to him to extend the time of said lease, he would have refused to do so, on the ground that it would interfere with the sale, by putting it out of his power to deliver possession at the expiration of the year.

He admits that on the 6th of January, 1847, the complain-

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ant called at his house, and held a conversation with him respecting the renting or purchasing the property, but which conversation is untruly stated in the bill. He says the complainant then called on him, and said he had called for the purpose of renting the mill for another year; that he replied, that he wished to sell the property, and had some expectations of doing so before the 1st of April, and would, therefore, decline renting the property at that time, and advised the complainant if he wanted the property, he had better buy it; that the complainant replied that he would rather purchase than rent, and inquired what he asked for the property, and he told him \$5000. The complainant said he thought it rather too much, but said that if defendant got an offer which he was willing to take, he wished the defendant to inform him and give him the refusal, at the price offered, which the defendant said he would do. That, as the complainant was about leaving, he again repeated that he would either purchase the property or rent it; and that he, the defendant, again replied, that his object was to sell, if he could, and that he would see him again on the subject, or words to that effect. He avers that this is the true conversation, in words or effect, which then and there took place between them respecting the renting or selling the said property.

He denies that the complainant, when he called, as aforesaid, and had said conversation with the defendant, stated or intimated to the defendant that he had called for the purpose of having the said further agreement, or some other additional agreement reduced to writing, for the better security and safety of the complainant, or words to that effect. He also denies that he, then and there, or at any other time before or since, agreed and consented to rent the premises to the complainant upon the same terms and conditions as mentioned in the then subsisting lease, for and during the term of one year, to commence on the 1st of April then next, or upon any other terms and conditions, or for any other term; but, on the contrary, he then and there declined to make any agreement with the complainant relative to the renting the said property, as hereinabove stated.

He also denies that the complainant then and there requested that the said term might be extended for two years, instead of

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one, according to an understanding and agreement made subsequent to the execution of said indenture of lease; on the contrary, he says the complainant did not, on that occasion, mention or refer to any understanding or agreement made subsequent to the execution of the said lease; nor did he claim or pretend to have any right to hold the premises beyond the term specified in said indenture or lease.

He also denies that it was then and there, or at any other time or place, finally agreed and arranged between them, that the complainant should have the premises, upon the terms and for the consideration and rent mentioned in the then subsisting lease, for and during the term of one year from the 1st of April then next, without reservation, and also for the year succeeding that, to commence on the 1st of April, 1848, provided he, the defendant, did not before that time sell or get an opportunity to sell the premises; but, on the contrary, he says that no agreement whatever was then and there made between them, relative to the renting or leasing the property for any time, or upon any conditions whatever; neither was there any agreement or arrangement whatever between them relative to the sale of the property, except the voluntary promise of the defendant, in case he had an offer for the property, to give the complainant the refusal, as before stated.

He denies that he did then and there, or at any other time, declare that he would come up to the residence of the complainant, on or about the 1st of April, 1847, if the weather and traveling were good, and sign and execute a new lease, or make any other declaration of the like kind or nature.

He says that, on or about March 11th, 1847, one Jos. A. Holden, who lived 25 miles from the mill property, called on him and said he was in search of mill property, and, having understood that the defendant's property was for sale, he had been to look at it, and wished to know what he asked for it. This defendant told him it was for sale, and asked him \$5000 for it. Said Holden offered \$4000, and he finally agreed to sell it to Holden for that sum; and he and Holden then agreed on the terms and conditions of the sale. That Holden then proposed that articles should then be drawn and signed, when he, recol-

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lecting that he had given his word to the complainant to give him the refusal, stated the fact to Holden, and requested a postponement until he could give the complainant the refusal; that to this Holden assented, and it was then and there agreed between this defendant and Holden, that he, the defendant, would, the next day, March 12th, 1847, send his two sons, William and Augustus, (defendant being prevented from going by lameness,) with full power and instructions to inform the complainant of the price which had been offered for the property, as aforesaid, and that the complainant could have the property for the said sum of \$4000; and if the complainant refused or declined the purchase, then the said Augustus, as the attorney-in-fact of this defendant, would enter into articles with Holden to convey the property to him, for the sum and on the terms and conditions which had been verbally agreed upon and settled between this defendant and Holden, as aforesaid; and Holden agreed to meet the said sons of the defendant at German Valley, where the property is situated, on the said 12th of March, for the purpose aforesaid.

He says that, though not bound to give the complainant the refusal, the promise to do so being verbal and without consideration, yet, being willing to keep his word, he did, on the said 12th of March, send his son to German Valley, with full authority and instructions as aforesaid, and for the purposes aforesaid; and that his son William did, on that day, call on the complainant, on the property, and told him he had been sent by his father to inform him that this defendant had an offer for the property, that Mr. Holden had agreed to give \$4000 for it, and that the complainant could have it for that price, if he wished it, and if not, they would sell it to Holden, to which the complainant, at first, replied that he would give as much as any man intended to pay for the property, and then said that if Holden had offered that sum, he, the complainant, would not make any offer.

That on the defendant's declining to purchase, afterwards, on the said 12th of March, his said son, as the attorney-in-fact of this defendant, entered into certain articles of agreement with said Holden, under their respective hands and seals, whereby

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this defendant, for \$4000 to be paid in three equal payments, the first to be made on the 1st of April then next, and the others in one and two years thereafter, agreed to convey the property, by warrantee deed, to Holden, on or before the 1st of April then next, with a covenant that Holden should and might take possession on the said 1st of April; and the parties to the said agreement bound themselves for its performance in the penalty of \$500.

That on the said 1st of April, Holden tendered himself ready, &c.

He denies that the complainant did, at any time, by himself or his agents, apply to him to comply with the said pretended verbal agreement, and to execute to him a lease pursuant to the said verbal agreement, alleged by the complainant to have been made on the 6th of January, as is untruly stated in the bill; and he avers and charges, that from the said 6th of January until the defendant agreed to sell to Holden, the complainant did not claim, set up or pretend to the knowledge or belief of the defendant, that there was any such agreement or agreements as he has set forth in his bill; neither has the complainant, since he was informed of the agreement to sell to Holden, requested him to comply with any such verbal agreement, or offer to comply with it on his part; but, on the contrary, in all their communications since that time, the complainant has urged and requested him to annul his said agreement with Holden, and to sell the property to him, the complainant.

On this answer, a motion was made to dissolve the injunction.

J. W. Miller, for the motion. He cited 2 *Green's Ch.* 429; 3 *Ib.* 434, 446; 1 *John. Ch.* 211; 1 *Halst. Dig.* 536; *Cooper's Eq. Pl.* 315, 316; 3 *Bro. Ch.* 205; 1 *Saxton* 428, 476, 488.

J. S. Hager, *contra*. He cited *Story's Eq. Pl.*, § 35, 852-3-4; 3 *Green's Ch.* 553.

THE CHANCELLOR. The complainant, by the bill, alleges a parol agreement for a lease for a second year, and states that,

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he cannot defend himself against the defendant's proceedings at law to turn him out of possession, because he has no proof of the parol agreement. He, therefore, by bill in this court, calls upon the defendant to discover the parol agreement; and prays that the defendant may be decreed to perform the same, by executing a lease to him for the second year; and prays an injunction, in the meantime, against the defendant's proceeding at law to turn him out of possession.

The defendant, by his answer, denies that he ever made the alleged parol agreement.

If the complainant had proof of a parol lease for a second year, he could defend at law. Having none, he came here, by bill, for discovery, and fails to obtain it. It is manifest that this court's jurisdiction of the case is at an end.

The injunction will be dissolved, and the bill dismissed.

Order accordingly.

ANDREW GARROCH v. ALVAH SHERMAN AND JAMES P.
JUDSON.

1. A bond, and a mortgage showing on its face that it was given to secure the payment of the bond, were executed. The mortgage came into the possession of the person named therein as mortgagee, he having given no consideration. The bond was never delivered. The person named as mortgagee assigned the mortgage to one who testified that he advanced no money on the faith of it, and he assigned it to the complainant, who, on taking the assignment of the mortgage, gave a writing under his hand and seal, that, in consideration of the assignment, he agreed to pay certain notes drawn and endorsed by the person named as mortgagee, and to cancel certain claims then in his hands against the person named as mortgagee.

2. Under the pleadings and proofs, the bill to foreclose the mortgage was dismissed.

3. A mortgage purporting to secure a bond is not good without the bond, unless it be made to appear that the person named as mortgagee is entitled to the possession of the bond. And a person coming into possession of the mortgage by assignment from him who is named as mortgagee, stands in no better position.

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The bill states that Alvah Sherman was indebted to Isaac Watkins in \$1500, and to secure the same, made out and signed his bond to Watkins for that sum, but never delivered the bond, under the pretence that it was unnecessary, as the mortgage (afterwards mentioned in the bill,) would be sufficient without the bond, and that if the bond should be wanted he would deliver it.

The bill then states that Sherman, to secure the said \$1500, executed and delivered to Watkins a mortgage, (setting out the mortgage.)

It then states an assignment of the mortgage by Watkins to one Eadie, and an assignment thereof by Eadie to Andrew Garroch, the complainant.

It then states that the records of deeds show the title to the mortgaged premises to be in James P. Judson, and charges that, before the making of the mortgage, Judson had conveyed the premises to Sherman, and that after the making of the mortgage, Sherman had re-conveyed to Judson. Sherman and Judson are made defendants.

The bill prays that Sherman may be decreed to deliver to the complainant the bond secured by the mortgage, and prays foreclosure, and a sale of the mortgaged premises.

Sherman, in his answer, denies that he was indebted to Watkins, and says that the said writings were executed by him for the purpose of obtaining a loan for his own use; and that, on the assurance of Watkins that he could obtain the loan for him, he handed to Watkins the writing purporting to be a mortgage, for the sole purpose of enabling Watkins to show the nature and value of the security that would be given for the loan, and that no loan was ever effected.

Sherman also denies, and so does Judson, in his answer, the conveyance and re-conveyance between them charged in the bill.

The testimony, so far as it is important in reference to the points decided, is as follows :

Samuel H. Gardner, sworn for the complainant.—I am a subscribing witness to the mortgage; I saw Sherman and his wife execute it; I was then a commissioner for taking the proof and acknowledgment of deeds; I think I saw a bond accompa-

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nying the mortgage, which was acknowledged before me at the same time the mortgage was ; I think I was the subscribing witness to it at the same time I subscribed the mortgage as a witness ; it was my understanding that the bond was the bond secured by the mortgage ; the bond and mortgage were acknowledged at Sherman's house, and I left them with him.

(The bond, or paper purporting to be a bond, being produced, it appears there is no subscribing witness to it.

Caleb B. Headley, for complainant.—There has been a conversation between Sherman and me, about his borrowing some money of me ; I cannot say there has directly ; there has been a considerable conversation between Watkins, Sherman, and me about borrowing money ; the first sum named was \$3500 ; I think \$1500 was also named ; I don't think I can tell with any certainty when it was ; my impression is it was in the spring, or fore part of summer, of 1844 ; a mortgage was proposed to be given to me as security for the money, by Mr. Watkins, on Sherman's property ; named two pieces of property for the purpose ; I preferred the mortgage on 24 acres of land ; there was some difficulty, I don't know what ; and they proposed a mortgage on the house and lot described in the mortgage in controversy in this suit ; I should say Watkins proposed it ; I do not recollect of Sherman and Watkins talking together with me at any one particular time ; Watkins did the most of the business ; I had some conversation with Sherman ; I do not know that he ever proposed to give a mortgage on the property in question ; I think it likely Sherman and I had some conversation on the subject ; but I cannot remember anything definite about it ; I was notified that the mortgage was ready, and I requested that they should satisfy a friend of mine and a lawyer he should choose, that the mortgage was clear, and the money should be forthcoming ; and that was the last I heard from them ; the money was not coming from me, but through me ; I would not like to say positive who it was said the mortgage was ready, whether Sherman or Watkins ; I am under the impression that both of them said so ; the money I said would be forthcoming was \$1500 ; during this negotiation, my impression is I had some conversation with Sherman on the

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subject, but I am not certain ; I don't recollect anything was said about J. P. Judson in this affair ; I don't recollect that I ever talked with him about this property or the mortgage up to yesterday ; in this negotiation Sherman was said to be the owner of the land ; I so understood from Sherman, or Watkins, or both ; I understood, at the time, that Watkins was to get the mortgage of Sherman and sign it over to my friend ; how it was to be done, I did not understand ; I don't remember anything positive as to Sherman's trying to persuade me to take that mortgage ; I never heard that there was anything done by my friend or the attorney to satisfy them on the subject ; I don't know how to answer, satisfactorily to myself, whether from my conversation with Sherman I was led to believe the mortgage was a good one ; there was a number of circumstances all tending to satisfy me that the mortgage was a good one ; but whether I got it from one or the other I cannot say ; my own knowledge of the property was evidence to me that it was sufficient if it was clear ; I cannot say for a certainty whether Sherman, in his conversations with me, ever said he was not the owner of the property ; this mortgage, as I understood, was to be made by Sherman ; I understood it that this loan was to be made provided they satisfied my friend and his lawyer.

Cross-examined.—I do not recollect what time it was that I was given to understand the mortgage was ready for \$1500 ; I should not think that from the time Watkins first applied to me for the money, it was more than four, five, or six weeks before the matter was at an end ; I think I have seen both Watkins and Sherman together, talking on the subject, but what was said I cannot remember ; when the loan of \$3500 was spoken of, Watkins was to give a mortgage on his own place ; he was to pay off a mortgage on his own place out of it, and give a mortgage for \$3500, clear ; I do not know that Sherman was to have any share in that loan ; I never heard him say he was ; with the \$3500 to be lent to Watkins, he was first to pay off the \$1700 mortgage on his own place, and for the rest he said he had got into difficulty and must have the money ; Watkins, before the last year was in embarrassed circumstances, as he said ; I do not know what his pecuniary situation now is.

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In chief.—Watkins stated to me that he had endorsed paper for Sherman; that the paper had fallen due, and it was necessary, to save his goods and chattels, to raise the money.

This is the plea he made for the want of the money; I understood that both Watkins and Sherman wanted money at the time; I should think it was the general opinion at that time that Sherman was in embarrassed circumstances.

John Eadie, for complainant.—The mortgage was assigned to me by Watkins; I was present when he executed the assignment; Cass, one of the subscribing witnesses to the assignment, was serving with me; Smith, the other subscribing witness, was serving with Watkins; they were laboring men; I saw them witness it; Smith is in Galveston, Texas; Cass, I believe, is living near Camptown; Watkins made the application to me to take the assignment of the mortgage—to discount it; I refused; this was in the fore end of May, 1844; it was a long while after that that I agreed to take it; it was in January, 1845, before I agreed to take it; it was not offered to me again until then; the consideration of the assignment to me was, Watkins was indebted to me much more than the face of the mortgage, for moneys advanced to him; Watkins lived next door to me, and Sherman also, one on each side of me; I had a conversation with Sherman about this mortgage, about a week, or perhaps only three or four days after it was offered to me; I believe he asked me why I had not taken the mortgage; that it was a good one, and that I never had better paper of the kind; I refused to have anything to do with it, stating that I had not money at the time convenient, and that I did not like the paper; I think he observed in this way, that Watkins and him had got into difficulty on account of some notes that was passing betwixt them; that he, Sherman, wished to raise money in order to pay off these notes or judgments; that he did not wish Watkins' property to be touched on his account; that is all that passed betwixt us; that I recollect, in 1844; I think, in the course of the conversation, he stated that they had got into difficulty and there were notes betwixt them, and judgments pending against them both upon them; I had no further conversation with Sherman on the subject, that I recollect, until the mortgage was assigned to me;

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when I took the assignment of the mortgage, I considered it a valid mortgage; the other assignment on the mortgage is signed by me; I made the assignment to Mr. Garroch; the subscribing witness is the same man, Smith, who witnessed the other assignment, and is now in Texas; the circumstances of this mortgage being assigned to me are these: Watkins got indebted to me pretty heavy; I pressed him for more securities than what I had, to make me safe; he said he had done all to secure me that he could, that mortgage of Sherman's excepted; I observed to him that I would take an assignment of that; the assignment was made, in the form and at the time it appears on its face; between the time Watkins first offered me this mortgage and the time I took it, I advanced to Watkins, at one time, \$2100 in cash, besides \$1500 of an old mortgage that was pressing upon him, and another \$1000 for which I took a mortgage on his place, making in all \$4600; this is all I advanced him betwixt those two intervals; the \$1000, I believe, was used for the purpose of taking up executions against him. (This was objected to by defendant's counsel.)

The question being put, "Did you understand, at the time, that the advancement of this money was to relieve Watkins from executions that were against him on Sherman's account?" the question was objected to.

The master overruled the objection and the witness answered: I was informed by Watkins and Mr. Frelinghuysen, his attorney, that such was the case. (The answer was objected to.)

The circumstances of making the assignment by me to Garroch were these: Mrs. Watkins called on me and wished to know if I would not assign over that mortgage of \$1500, in behalf of Enos Baldwin, William Ashley and Andrew Garroch; she showed me a title she had for some little property in Scotland, and offered to assign that over to me if I would assign that mortgage to those persons, and I agreed to it, for to cover notes they had endorsed for Watkins, I believe to the amount stated in that paper given by Garroch to me; the proposal was made, unknown to Watkins, wholly on the part of his wife; as far as I know, he agreed to it; I don't know that he and I had any conversation about it at the time; he never made any objection

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to it that I ever heard of; I am from Scotland; I understood where the property lay, but not much about it; Watkins is from Scotland also; in pursuance of that arrangement I made that assignment on the mortgage; at the time of that assignment, Garroch gave me back a writing, a copy of which has been exhibited on the part of the complainant; the original I have in my possession; at the time of making the assignment to Garroch, I considered it a good mortgage; I think likely I told Garroch so; I don't think Sherman ever told me the mortgage was not a good mortgage until after I had assigned it to Garroch; sometime in the spring of 1845, after Sherman had returned from the legislature, and after I had assigned it to Garroch, Sherman told me the mortgage was good for nothing.

Cross-examined.—On the 8th or 9th of May, when Watkins first applied to me to discount the mortgage, I saw it and read it; I did not see any bond accompanying it; I made no inquiry for it; I notice that the condition of the mortgage called for a bond; the loan to Watkins of \$2100 was made in New York, on the security of his own note and an old note for that amount which was taken up by Watkins, in the City Bank, under protest; Watkins was endorser on this old note, for some friends in Rhode Island or Connecticut; I don't remember where that old note was dated; I gave it up to Watkins when I got a deed for his property; this loan was made, as far as my memory serves me, from the 1st to the 10th of July, 1844; it was for 30 days; the new note was payable in 30 days, I think; it was not paid when it fell due; it was not lodged for collection; when it fell due I did not take any further security until I got a deed for his property; the advance of \$1500 was made in May previous; that was made for the lifting of an old mortgage that was foreclosing against him, which was assigned to me; this was in the fore end of May, 1844; there was no bond accompanying this old mortgage, but I got a new bond from Watkins alone; this bond has been paid, so far as I have got a deed for his property; the \$1000 loan was made in the same month of May, after the application by Watkins to discount the mortgage in question; I am not sure whether the \$1500 was lifted before or after he applied to me to discount the mortgage in ques-

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tion in this suit; the \$1000 was advanced after that application; I took a bond and mortgage on the whole of Watkins' farm as security for this \$1000; this money, I understood, went into the hands of Fred. T. Frelinghuysen, to pay judgments on endorsements by Watkins and Sherman; but whose debts they were I know nothing about it; that is what I meant in my direct examination; I never advanced a dollar on the faith of the assignment by Watkins to me of the mortgage in question; I received the deed from Watkins for his farm in August, 1844—the 24th, I think; it was not acknowledged when I first received it; it was acknowledged about February 1st, 1845, and at that time Watkins was indebted to me \$5800; Mrs. Watkins never acknowledged the deed—she signed it, but never would acknowledge it; the deed was delivered to me at the time of its date, and remained in my possession from that time till the said 1st of February, 1845; a bill of sale was made by Watkins to me, about the time of the date of the deed, of all his personal property; an estimate was made of its value at the time, and the property was delivered; it was taken as collateral security; I do not remember the amount; the deed was not a collateral security—that was a sale; the price of the whole property was \$5800; it was sold to me out and out, *bona fide*, for that price; there was an encumbrance on the property of \$300 a year; the thing was fairly finished on or about February 1st, 1845; the deed was made in August preceding, but the bill of sale was not made, I think, till February; it may have been made in August; the \$5800 was for the whole property, real and personal; the personal property remained as a collateral security until on or about February 1st, 1844, when it was turned over to me absolutely; I do not recollect what was the consideration of the real estate; the two was connected together, and amounted to \$5800, but I do not recollect what each was valued at by itself; I have advanced no money to Watkins since that time; there is some rent and other small matters due to me; rent, \$150, and 10 per cent. on the value of the personal property; the assignment to Garroch was made just about the same time I finished up a settlement with Watkins, in February, 1845; they were both done about the 1st of February;

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but they were distinct transactions, each one by itself, and were not connected together; I took Mrs. Watkins' statement as to the value of the property in Scotland; I knew something of its value from knowing where it was situated; from what I understood, I estimated the value of it to something like from two to two hundred and fifty pounds sterling; she had the copy of a will of her uncle, willing it to her and a couple of her sisters, and she gave me a power of attorney to get it; Watkins never signed it; there was never any occasion for it; it had never come into her hands; I hold that power of attorney, so that, provided I cannot sell the property here to cover me, I may be safe to the amount due me; I bought the real estate and personal property at an out and out sale for \$5800; there is no time limited in which I am to sell the property here; I may sell it now, or I may sell it in 100 years if I choose; there was no bond accompanying the mortgage in question in this suit, when it was assigned to me; I never saw any until I saw it here to-day. [An interlineation in the assignment from Watkins to the witness, in these words, "and the bond therein mentioned and all moneys secured by the said mortgage," being shown to the witness, he says]—I think Watkins made the interlineation; but I do not know; it was made at the time it was signed, as far as I know; I do not know who wrote with a pencil first, under the interlineation; I think it was done at the same time the body was wrote, but I cannot remember particularly; I cannot say when it was done; I have no recollection of it; the assignment from me to Garroch, I presume, is in Mr. Boylan's handwriting; the other is not; I don't think he ever saw it before the execution of the assignment from me to Garroch; it was not out of my possession till then; the assignment from Watkins to me was made, I suppose, in my own house. [An interlineation in the other assignment being shown to witness, and he being asked when it was made, he says]—I don't recollect when the interlineations were made; I have no recollection about them; if my attention had not been called to them now, I should not have known they ever were made; I knew there was no bond with the mortgage when I took the assignment from Watkins; I never looked for one; I did not consider the bond of much worth, a

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mere personal thing ; I never applied to Sherman for the bond, nor ever asked him why one was not delivered ; I cannot say that I said anything to Garroch about the bond when I assigned the mortgage to him ; he must have seen there was none ; I negotiated the assignment to Garroch, and the terms of it, at Mrs. Watkins' request ; Watkins gave his consent to it ; I believe all the terms of that assignment were made between me and Garroch.

The question being put "I want you to state distinctly and fully the terms on which Garroch holds the mortgage," the complainant's counsel objected to the question, and to any evidence as to the terms on which Garroch holds the mortgage, except as they appear by the written agreement. The master overruled the objection, and the witness answered :

The terms specified in the paper was agreed upon betwixt him and me, and the money to be paid over to the separate parties, as soon as collected ; that is the whole sum and substance of the business ; I do not recollect of any conversation in the fall of 1844, between Sherman and me, in reference to the state of accounts between Watkins and Sherman, in connection with that mortgage ; there was a settlement of accounts between me and Sherman that fall ; I think we did not at that time, to my knowledge, have any conversation about the state of accounts between him and Watkins in relation to that mortgage ; I did once make an effort, at Sherman's request, to get a settlement between him and Watkins ; this was, to the best of my recollection, early in the spring of 1844 ; it was before the application was made to me to discount the mortgage, a long time, according to the best of my recollection ; Sherman at that time made no mention of the mortgage in question ; I heard something of an effort made by Sherman to raise money in New York ; I think he mentioned it to me himself, but when it was, I cannot recollect ; he said a dark cloud was hanging over him, and he must raise money to get it off ; I understood he proposed to give a mortgage on the property and buildings where he lives now ; before any suit was brought by Garroch, on this mortgage, he and I called on Gov. Pennington, with the papers, and showed him the assignments on the mortgage ; Gov. Pennington observed that

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the words interlined in the assignment were wanting, and he said if I would leave them with him, he would make them as they should be, and would send them up to me, to be executed by Watkins and myself over again ; the mortgage was sent to me with the interlineations in pencil-marks, and Watkins filled up the interlineation in his assignment, in presence of the said attesting witness, James Smith, and I filled up mine in presence of the same witness, who then, for the first time, signed his name as a subscribing witness to the said assignments ; this has come to my recollection since my previous examination, and on a conversation with Gov. Pennington ; the assignments were re-acknowledged by Watkins and myself, at that time, in presence of that witness ; this was done when Garroch applied to Gov. Pennington to prosecute the mortgage in question, but before this suit was brought thereon ; I think it was within eight or ten days after the assignment to Garroch ; I held the mortgage in question at the time of assigning it to Garroch, on account of a debt owed by Watkins to me for money lent and advanced ; I don't recollect stating to Garroch anything to the effect that the mortgage was doubtful, or an invalid security ; I do not recollect that I gave him (Garroch) any intimation in the negotiation with him in reference to this mortgage, that there was any difficulty about it, for I had no such idea myself ; I represented it to Garroch as a good and valid mortgage ; at our first interview with Gov. Pennington, we left the mortgage with him ; I believe I received it again from Gov. Pennington's hands, at my house, a very short time—one, two, perhaps five days—after we left it with him ; he said he was going further, and would call in the evening, on his return, and get it, which he did ; I remember having conversations with Sherman—it strikes me it was in the spring of 1844—in relation to a settlement of accounts between him and Watkins ; this was before the settlement of accounts between me and Sherman—some time before his offering to me the mortgage for discount—as I have before stated ; I don't think I was informed by Sherman, at that time—the time of these conversations—that he owed Watkins nothing.

In chief.—Cass was not present when the assignments were re-acknowledged ; I now affirm and approve the assignment by

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me as it now stands; I knew, before taking the mortgage in question, that Sherman and Watkins had had dealings and accounts together; they both told me so; Sherman has been engaged in business in that neighborhood ever since I have known him; I can't say that I knew that Watkins was doing any business; I had no knowledge of any business of his, except what he told me himself; he lived in Camptown for five or six years—was on a farm he purchased there; I believe his principal business was signing accommodation bills and borrowing money.

Re-cross-examined.—I came to Camptown May 29th, 1843; the first money I advanced was that for lifting the \$1500 mortgage which I spoke of before; I do not recollect of his applying to me for any amount before that; I may have let him have a few dollars; it was at the time of advancing money for that mortgage, which was foreclosing at the time, that I first learned that Watkins was in failing circumstances; it was public rumor that he had erected large improvements on the property he occupied; I have no knowledge of it myself.

After the closing and signing of Eadie's examination, the defendant's counsel objected to the admissibility of his testimony, on the ground that it appears, on the face of the testimony given by him, that he is interested in the event of the cause.

The testimony on the part of the defendants, so far as it relates to the points decided, is as follows:

Abraham H. Sherman.—I have seen the bond and mortgage exhibited in this cause; in the latter part of May or 1st of June, 1844, I know of the said mortgage being in the possession of A. Sherman; I think, certainly, it was the last week in May.

Mary C. Sherman, aged sixteen years.—I remember seeing Mr. Samuel H. Gardner at my father's house in May, 1844; I am a daughter of A. Sherman; I was in the store when Gardner called; he inquired for my mother; he came alone; I invited him into the room, and called my mother; he remained about five minutes; he came to leave a mortgage; I saw the mortgage; it was on the premises where the store is; I saw the mortgage a number of times during the summer and fall of 1844; can't say how late in the fall; think it was September; the mortgage was from my father and mother to Mr. Watkins,

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for \$1500 ; my father had gone to New York when Gardner called ; the mortgage was in father's secretary when I saw it in the summer and fall of 1844 ; I do not know the form of taking an acknowledgment ; I understood that Gardner had taken the acknowledgment at that time ; Judson was not there at that time ; I did not see him there during that day ; I fix the month of May as the time of taking the acknowledgment of my mother because I was then assisting in the store ; I had never seen the mortgage before then ; I remember the paper marked Exhibit P No. 4, (the bond,) as one of the papers Mr. Gardner had, and remember the similarity in the blotting on the bond and mortgage.

Cross-examined.—Mr. Gardner came about ten in the morning ; my father started for New York about 8 or 9 that morning ; I can't say how he went ; in going to New York he would go near Mr. Gardner's house ; I made no memorandum of the time spoken of ; my mother and Mr. Gardner retired to another room.

William W. Sherman, son of defendant, A. Sherman. (The mortgage in dispute being shown him.)—I have seen this paper before to-day and subsequent to the day it bears date ; I saw it at our place several times during the summer of 1844, and along in the fall of the same year, at the same place ; I saw it five or six times ; I recollect seeing it late in the fall, in my father's desk—what they call the secretary ; my sister Mary was with me when I saw it in the desk ; we were looking at the contents of the paper together at that time ; I saw it several times in the desk besides ; I heard a conversation between my father and Mr. Isaac Watkins respecting the mortgage and the purpose for which it was given ; it was along in the summer of 1844, as late as June or July, and while the mortgage was yet in the secretary ; it was stated in the conversation, that the object of the mortgage was to raise a fund for father's benefit, and Watkins said he thought at the time he would be able to raise the money for him ; I know of an effort made by Mr. Watkins for that purpose ; he said he had gone to Westfield to see if he could not raise it from a gentleman there, but he said he could not get it there ; he said he would go to see Mr. Headley, to

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see if he, Headley, could not get it from a lady; I heard him say afterwards that he could not get it there; it was along in June, 1844, that he went to see Mr. Headley, or said that he went. (So much of the above testimony as has relation to the conversation between Sherman and Watkins was objected to by complainant's counsel.)

Cross-examined.—The latest date I can fix, with certainty, as to the time when I saw the mortgage in my father's possession, was along in September, 1844; it was prior to this date that Watkins made the efforts referred to to get the money; Watkins did not take the mortgage with him when he went to raise the money; can't say whether there were any assignments on the mortgage at that time or not; my father and Watkins were friends at that time—prior to that time they had considerable dealings together; I know that, prior to that time, Mr. Watkins had endorsed for my father a few hundred dollars; I should say ten or twelve hundred dollars; I am a son of A. Sherman.

In chief.—The endorsements spoken of were for the firm of C. A. Sherman & Co., composed of Alvah Sherman and his son, Charles A. Sherman; I should not think the endorsements were over \$1000, but I have no memorandum of them.

An instrument under the hand and seal of Garroch, of which the following is a copy, was produced on the part of the complainant: "Whereas John Eadie has this day assigned to me a mortgage made by Alvah Sherman and wife for fifteen hundred dollars. In consideration whereof I do agree to pay the face of the following notes, to wit, one note of \$400, drawn by Isaac Watkins, and endorsed by Enos Baldwin; one do., of \$310, drawn by Isaac Watkins, and endorsed by Enos Baldwin; one do., of \$420, drawn by Wm. Ashley, and endorsed by Isaac Watkins and Enos Baldwin; and I further agree to give up and cancel claims now in my hands against Isaac Watkins and Enos Baldwin, which claims amount to \$345. In witness whereof I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated this first day of February, in the year of our Lord one thousand eight hundred and forty-five. Signed, A. Garroch. [L. S.]

"Sealed and delivered in the presence of Aaron A. Boylan."

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F. T. Frelinghuysen and *W. Pennington*, for the complainant. They cited 4 *Kent's Com.* 145; 2 *Story's Eq.*, §§ 145, 1018; 1 *Ib.*, §§ 381, 389.

A. C. M. Pennington and *A. Whitehead*, for the defendants. They cited 1 *Johns. Ch. R.* 499; 2 *Atk.* 19; 1 *Bro. Ch.* 52.

THE CHANCELLOR. The answer of Sherman has not been overcome; and there is no proof that Sherman was indebted to Watkins, or that Watkins, either before or since the writing purporting to be a mortgage came into his possession, paid any of his endorsements for Sherman, or paid money for him in any other way.

Watkins could not have foreclosed the mortgage, (it purporting to secure a bond,) without producing the bond, unless he could show that he was entitled to the possession of the bond. No reason or consideration has been shown why the bond should have been delivered to Watkins.

Eadie, who took from Watkins an assignment of the mortgage, admits that he advanced no money on the faith of it.

If the assignment by Eadie to Garroch, the complainant, could put Garroch in any better position than Watkins or Eadie occupied, and if, from the testimony, I could feel well assured that the assignment to Garroch was a *bona fide* transaction, yet the fact that the mortgage showed on its face, that it was intended to secure a bond was sufficient to put him on inquiry in reference to the bond, and he, therefore, took the mortgage subject to every defence that could be made against it as between Sherman and Watkins.

The bill will be dismissed.

Order accordingly.

Vansyckle v. Rorback.

ANDREW VANSYCKLE v. JOHN RORBACK ET AL.

1. V., a minor, entered into partnership with N. and S., in Sussex county, and put in \$1000 of capital. Before V. came of age the partnership was dissolved, V. receiving his \$1000. After the dissolution, V. having removed into Hunterdon county, R. recovered a judgment against the members of the firm, including V., without V.'s knowledge, no process being served on him. R. transferred this judgment to A. Three years afterwards, A. brought an action on the judgment and recovered a second judgment on it, without the knowledge of V., no process being served on him. A. procured the second judgment to be docketed in the Supreme Court, and caused an execution to be issued to the sheriff of Hunterdon, and to be levied on the property of V. in that county. On bill filed by V., stating the foregoing facts, and charging combination and fraud, to subject him to the payment of the judgment, an injunction restraining proceedings on the execution was allowed.

2. The defendants put in answers, and a motion was made to dissolve the injunction.

3. The injunction was continued to the hearing.

On the 8th of December, 1846, Andrew Vansyckle exhibited his bill, stating that in December, 1839, being then but 19 years old, he formed a partnership in the milling and iron foundry business, with one John Northrup, Jr., and Mahlon B. Staats, (one of the defendants,) in Sussex county, under the name and firm of Northrup, Staats & Co.; that Northrup and Staats then were, and had for sometime previous, been engaged in the business as partners; that at the time the complainant was taken into business with them, it was understood that they each had \$2000 invested in the business, and that the complainant then put in \$1000, upon the understanding and agreement that each was to receive profits in proportion to the amount of his capital invested; that the business of the firm was thus continued till May following, (1840,) when they opened a store, in connection with the mills and foundry, upon the same capital, and the same arrangement as to the division of the profits of the whole business; that the firm continued in business until the 1st of October, 1840, when it was dissolved, by mutual consent, by the complainant's selling out his interest to Northrup, with the knowledge and consent of Staats, for \$1000, being the amount of capital he put in; that the complainant had not received, and by

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the terms of the dissolution he was not to receive any part of the profits made by the firm, nor was he to be liable for any of the debts then outstanding against the firm, but the said Northrup, for the said sum of \$1000, received all the complainant's interest in said firm, and was to pay all the complainant's liabilities on account thereof; the complainant losing his entire services and the interest on the said \$1000, for the whole period of his continuance in the firm.

That at the time of the dissolution the firm was amply able, out of its property, to discharge all its liabilities.

That when he was applied to to become a partner, and when he became a partner, Northrup and Staats were both apprised that he was a minor.

That during the continuance of the partnership, debts were contracted by the firm, some of which have not been paid off by Northrup and Staats, and some of which have since been demanded of the complainant.

That the complainant has lately been informed, that John Rorback pretends to have held a claim against said firm, for a debt contracted during the continuance of the said partnership, now amounting, with costs, to upwards of \$400, and that Rorback recovered a judgment against said firm, on account of said claim, in the Circuit Court of Sussex, on the 15th of August, 1843, for \$331.76, damages and costs, but that said judgment was recovered without the knowledge of the complainant, and without his having any process served on him, or any notice or knowledge of the same whatever, or of the existence, at that time, of the said debt.

That the complainant has been informed that some time after the recovery of the said judgment, at what time he cannot state, Rorback transferred it to Ebenezer Aber, whether with or without consideration the complainant is unable to state; and that, without any notice to the complainant, or demand of payment, Aber commenced a suit on said judgment, in the name of Rorback, in the Circuit Court of Sussex, against the complainant, with the said Staats, (Northrup having previously died,) and that on the 4th of August, 1846, he recovered judgment thereon, for \$390.92 debt, and \$34.37 costs.

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That no process in said suit was served on the complainant, and that he had no notice thereof till some considerable time after the said judgment was entered, or any knowledge of the existence of the first-mentioned judgment.

That shortly after the entry of said judgment in the Circuit Court of Sussex, Aber procured the same to be docketed in the Supreme Court, and immediately after caused an execution to be issued thereon, out of the Supreme Court, against the complainant, together with said Staats, and placed in the hands of the sheriff of Hunterdon, returnable to October Term, 1846, by virtue of which execution all the property of the complainant has been levied on.

That Northrup died in March, 1845, intestate, in Sussex, and that Azariah Davis is the administrator of his estate.

That Staats still resides in Sussex, and has a large amount of property in said county, and has no property, as the complainant believes, in Hunterdon; nor is there, as the complainant believes, any property in Hunterdon, belonging to the estate of Northrup, nor any property in Hunterdon on which to levy said execution, except the property of the complainant.

That immediately after the dissolution the complainant removed from Sussex to Warren county, where he remained about six months, when he removed to Hunterdon, where he has ever since resided.

That the first notice he had of the existence of said debt, or of any pretence that such debt was due to Rorback or Aber, was the service of the said execution by the sheriff of Hunterdon, on the 26th of August, 1846, no notice of any of the said proceedings concerning the same having been given to him, and all knowledge thereof seeming to have been purposely withheld from him, in order that he might not have the benefit of a plea of infancy, to which they well knew he was entitled, or of any other defence; and thus, before he should be aware of said claim or any proceedings thereon, to heap judgment upon judgment on said claim, for the purpose of entangling and embarrassing the complainant, and the more effectually to prevent and disable him from setting up the legal and equitable defence which they well knew he might otherwise do.

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That Rorback is not an original creditor of the said late firm ; but that he received the note on which the said judgment was founded, by assignment, whether for a valuable consideration or not the complainant is ignorant, from one George H. Nelden, of Sussex, to whom, as the complainant is informed, it was given by said firm, for about \$200 ; and that at the time he must have received said note, the complainant did not reside in Sussex, and had no property there to which Rorback could have looked for the satisfaction of the said claim ; and that he must then have looked to the other members of said late firm for the payment of the same, as must also have been the case with Aber, at the time he received the transfer of said judgment from Rorback.

That if said transfers were *bona fide* and for a valuable consideration, Rorback and Aber must have looked to the property of the other parties, in Sussex, and not to the complainant, who, with all his property, was in the county of Hunterdon.

That Nelden was well acquainted with the complainant, and had been almost from the complainant's infancy.

That the complainant had been in the employ of Nelden, in his store, for a considerable time, and had left there but a short time previous to his entering into the said partnership with Northrup & Staats ; and that Nelden well knew, when he received the said note, that the complainant was a minor.

That Rorback and Aber are both residents of Sussex, and resided in the neighborhood of the complainant, and were well acquainted with him, and had been for years, and, the complainant charges, well knew that he was a minor during the whole period of his continuance in the said partnership.

That at the time Rorback obtained the said judgment against the said firm, there was abundance of property of said defendants in Sussex, out of which the amount thereof might have been made, upon which the execution might have been immediately levied, if said judgment was not then paid ; and that, if it was not then paid, the complainant cannot conceive why the money was not made out of the property of the said firm at that time, or the complainant informed of said debt and requested to pay it, unless, as the complainant charges the truth to be, the whole matter was a contrivance between Rorback and Northrup and

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Staats, for unjust extortion from the complainant when no debt existed, and which he was not legally or equitably liable to pay. That this is not the first effort to obtain money from the complainant under these pretences.

That on or about November 12th, 1844, one Aaron A. Ackerson obtained a judgment, in the Supreme Court, against the said late firm, on some assigned claim, for \$656 damages and \$37.08 costs, which was also obtained without the knowledge of the complainant, or the service of any process on him, or any notice to him. That execution of said judgment was issued against the complainant, and sent to the sheriff of Hunterdon and levied on the property of the complainant; and that the complainant paid the said execution, amounting to \$731.90, out of his own estate, without having ever received any value for the same, which he paid rather than suffer an expensive litigation for the purpose of avoiding it; and, since Ackerson's success, (whose proceeding, the complainant charges, was at the instance and by the aid and connivance of Staats,) the said Rorback and Aber, who, the complainant charges, are now proceeding with the assistance and for the benefit of Staats, are encouraged in the prosecution of the present attempt further to extort from the complainant.

That he has no knowledge of the existence of any such debts, and that if they do exist, he is not liable for them.

He charges that this mode of proceeding against him has been adopted for the purpose of defrauding him and obtaining judgments against him without his knowledge, that he might be deprived of any defence; and that it is done by the connivance and consent of Staats with the persons prosecuting; that otherwise there could be no object in their prosecuting thus secretly, and studiously seeming to withhold all knowledge thereof from the complainant, and multiplying judgment on judgment which had secretly lain for years without the complainant's knowledge, when the complainant and Staats were both in a situation to discharge the same at the time of the obtaining thereof; and when the complainant's residence has been known and public ever since he left the county of Sussex.

He says he is advised that the said judgment obtained by Ror-

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back against him is not valid against him, as he could not legally be condemned unheard, though he were indebted on a joint contract, unless he had an opportunity to make his defence.

That so much time had elapsed before he had any knowledge of the existence of the said suit or judgment by Rorback as to deprive him, at law, of taking any steps to get in his defence, or to set aside the said judgment.

He charges that there is nothing due Aber or Rorback from the said late firm, and repeats the charge that the said proceedings are by the contrivance and at the instance of Staats.

The bill prays that the said judgment may be declared to be void as against the complainant, and proper to be relieved against; and that Rorback, Aber, and Staats may be enjoined from further prosecuting the said judgments, or either of them, against the complainant; and that the sheriff of Hunterdon may be restrained from selling any property of the complainant by virtue of the said execution in favor of Rorback for the use of Aber; and that the plaintiff in said execution may be confined to his remedy against Staats and the estate of Northrup; and for further relief.

Rorback, Aber, Staats and the administrators of Northrup are made defendants.

The injunction prayed was allowed.

Rorback, Aber, and Staats have put in separate answers.

The answer of Rorback admits that, on the 15th of August, 1843, he recovered a judgment against Northrup, Staats, and the complainant, in the Sussex Circuit, for the amount stated in the bill; and says that this judgment was recovered for the amount then due upon two notes made by the said firm, both signed with the partnership name; one, dated April 1st, 1840, for \$29, payable one day after date, to Richard Gray or bearer; the other, dated June 24th, 1840, for \$233.62, payable one day after date, to George H. Nelden or bearer; that said suit was commenced by summons, returnable to January Term, 1843, of said court, which, he admits, was served by the sheriff of that county on Northrup and Staats, but not on the complainant, who, he is informed and believes, was not then residing in the said county; and the said sheriff returned, on the said summons, that the complainant could

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not be found in his county ; that he has no knowledge, except what he has derived from the bill, whether the complainant knew of the pendency of said suit or not ; but he states, and charges the truth to be that, before the suit was commenced, he several times spoke to Northrup, Staats, and the complainant in relation to said notes, and informed them that he held the same, and requested them to pay the same ; and that when the complainant was so spoken to by him, he made no objection against the said notes, nor against the justness or honesty of the debt due thereon to him ; nor did he then, or at any other time, say or intimate to this defendant, that he was a minor when the said notes were made.

He says that, on the 18th of February, 1846, he assigned the said judgment to Ebenezer Aber, of Sussex, by deed of assignment as follows—(giving the assignment literally.) It is in substance as follows: “Whereas he, in the term of August, 1843, or of some other term in the Sussex Circuit, recovered a judgment against Northrup, Staats, and Andrew L. Vansyckle for \$300.64 damages and \$31.12 costs, more or less. Now this writing witnesseth that, for the consideration of the amount due thereon to him paid by Ebenezer Aber, he assigns to him, his executors, &c., the said judgment and all moneys due or to become due, and the benefit of all proceedings by execution or otherwise had or to be had or done thereon ;” and he constitutes Aber his attorney irrevocable, in his name, to Aber’s use, to do, for the recovery and settling of the said damages and costs, everything that he could do ; covenanting to do nothing whereby Aber will be defeated in the recovery of the moneys due on the said judgment, but on the express condition that all costs and expenses which may accrue by reason of anything done in the premises shall be paid by Aber, and that he, Rorback, shall not be liable for any part of the same.

He says that, whatever money was paid for the said assignment, was paid to David Thompson, Esq., who, as his attorney, had brought the suit, and drew the assignment of the judgment ; and this defendant does not know what amount was paid to him, but believes the whole amount of said judgment debt, interest, and costs, was received by said Thompson, inasmuch as he paid

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this defendant the whole amount of debt and interest due on said judgment, to wit, \$300.64, the debt due this defendant, and also the interest thereon from the 15th of August, 1843, until it was paid to this defendant, and informed this defendant that he had received the costs.

That he does not know of his own knowledge who paid to Thompson the money for the said assignment; that Thompson, as his attorney, had his entire confidence, and he left the whole management of the business to him, Thompson, and this defendant gave himself no further concern about it, except to receive what was due to himself; but this defendant believes that he was informed by the said Thompson that he had received the money for the said assignment from the attorney of Ebenezer Aber.

That after he received the money due him as aforesaid, he gave himself no further concern about the said judgment, or any subsequent proceedings thereon, but admits that he has been informed that a subsequent judgment was recovered thereon, in his name, for the use of said Aber, in the Sussex Circuit, against Staats and the complainant, (Northrup having previously died,) and was docketed in the Supreme Court, and an execution issued thereon to the sheriff of Hunterdon.

He admits that Staats still resides in Sussex, but he has no knowledge of the amount of his property, nor whether there is property in Hunterdon belonging to Staats or the estate of Northrup.

He says that the said notes were, on the 15th of September, 1840, and while the said partnership was still in existence, assigned to him by the said Nelden, and the payment thereof guaranteed by him to this defendant; that this defendant received them from him for his accommodation, and at his particular request, and advanced him the money thereon, upon the representation by him, and the belief of this defendant, that they were valid *bona fide* claims against the said firm.

He denies that when he received the said notes from Nelden he knew that the complainant was a minor, and charges and insists that he never heard or knew that the complainant was a minor while he was a member of said firm, until long after he had

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so received the said notes; but at what time he heard of it he does not now recollect.

He says that when he recovered his judgment, as aforesaid, in August, 1843, Northrup had considerable property in Sussex, but that the same was encumbered at that time for greatly more than its value by prior judgments and mortgages, and that, at the same time, Staats had considerable property in Sussex, which was also encumbered by judgments prior to that of this defendant, although this defendant believes that if he had pressed a sale of Staats' property it would have satisfied his judgment; but this defendant had no desire to press or crowd Staats, or to sacrifice his property at sheriff's sale, and at his urgent request delayed enforcing the judgment, in order that he might have an opportunity the more easily to pay it.

He denies that there was any contrivance whatever between him and Northrup and Staats, or either of them, for the purpose of extorting in any manner from the complainant, or oppressing him in any way, or compelling him to pay a debt that he was not bound to pay.

That this defendant fully believed his debt was a just one, and justly due to him from all the said partners, and proceeded in the collecting thereof in the same manner that he would in any other case.

He denies that, in executing the aforesaid assignment, nor in any of the proceedings connected with the judgment so assigned, he was actuated by any desire to extort money from the complainant, or acted with the assistance or for the benefit of the said Staats; his only desire was to collect the debt honestly due to himself; and insists that, for that purpose, he had a perfect right to assign the said judgment as he did; and that since the said assignment he has given himself no concern about the same, and had no part whatever in any of the subsequent proceedings, and is entirely ignorant at whose instance and by whose contrivance and for whose benefit the same have been had.

He says he has no knowledge whether the said judgment has been paid or not since the said assignment; but he charges that at the time of the assignment there was due and unpaid upon said judgment the amount so paid as aforesaid to the said David

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Thompson for the said assignment.

The answer of Aber states that, on the 18th of February, 1846, Rorback assigned the said judgment to him, by deed of assignment in the words and figures following (setting out assignment.)

He says he was not present when the said assignment was executed nor delivered, nor when the money for the same was paid; that he is advanced in years—being upwards of seventy—quite lame and infirm, and but seldom goes from home, and lives about seven or eight miles from Newton, where Rorback lives, and where the said business was transacted; that for some years past, M. Ryerson, Esq., of Newton, has acted as the attorney of this defendant, and transacted all his business requiring professional assistance, and that the money to pay Rorback for the said assignment was placed in the hands of said Ryerson, who acted in the matter at the request and as the attorney of this defendant, and was requested, by this defendant, to pay the money to Rorback, and procure an assignment from him of the said judgment to this defendant. And this defendant kept no memorandum of the amount of money so deposited with the said Ryerson, or of the amount paid by him, and cannot therefore state, from his own recollection, the exact amount paid, but was informed by the said Ryerson, and so charges the truth to be, that he paid to David Thompson, the attorney of Rorback, on the delivery of the said assignment, the whole amount of the said judgment debt, interest, and costs.

That before the execution of the said assignment, Staats called on this defendant, and represented that Rorback was pressing the payment of the said judgment, and would sell his property unless the amount of the judgment was soon paid to him; and further stated to this defendant that the said judgment grew out of the partnership debts of the said firm, and that, in justice, the complainant should pay the same, inasmuch as he (Staats) had already paid large sums of money on account of the debts of the said firm, and the estate of Northrup was insolvent, and that the complainant was bound to pay his proportion of the said firm debts, and requested the defendant, as his friend, to advance the amount of the said judgment to Rorback, and take an

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assignment thereof from him, and endeavor to collect the same out of the complainant; and this defendant, believing the representations of Staats, and believing that it was just and right, that the complainant should pay the said judgment, consented to to take an assignment thereof, and to collect the same, if possible, from the complainant, in order to relieve Staats from the payment of what this defendant believes it was unjust for him to be compelled to pay.

That, after the said assignment was executed, he instructed his said attorney to go on and collect the said judgment, if possible, from the complainant, and that a suit was brought by his said attorney, upon the said judgment, in the said Circuit Court, in the name of Rorback, for the use of this defendant, against the complainant and Staats (Northrup being then dead), the summons in which was returnable to the term of May, 1846, of said court, and was returned served on Staats, and "not found" as to the complainant, in which suit judgment was recovered on the 4th of August, 1846, for \$390.92 debt, and \$24.07 costs.

He admits, that before bringing the last-named suit, he gave no notice of the said claim to the complainant, nor demand payment thereof from him, and believes his said attorney did not, either.

He says he has no knowledge, except from the bill, of the time when the complainant was first informed of the existence of either of the said judgments.

He admits that the last judgment was, shortly after it was recovered, docketed in the Supreme Court, and that a *fi. fa.* was issued thereon to the sheriff of Hunterdon, returnable to October Term, 1846, of that court, and that the said sheriff was directed to levy upon all the property of the complainant, and sell it to satisfy the said judgment.

He admits that Northrup died in the spring of 1845, intestate, and charges that he died largely insolvent, and that his estate will not pay five per cent. of his debts.

He admits that Staats still resides in Sussex, and owns considerable property there, but to what amount it is encumbered, he does not know; and he believes that there is no property in

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the county of Hunterdon belonging either to him or to the estate of Northrup.

He denies that he ever knew or heard that the complainant was a minor when the said notes were given, or that he had any defence to the judgment assigned to him, till since the subpoena and injunction in this suit were served upon him ; but insists and charges, that when the judgment was assigned he believed it was a regular and valid judgment, and binding on the complainant and Staats, and had no suspicion to the contrary ; and he denies that he purposely withheld from the complainant any knowledge of the said proceedings, in order to prevent him from setting up the plea of infancy, or any other defence to the said judgment.

He says he is advised by his counsel, that in a suit on the first judgment, a plea, by the complainant, of infancy when the said notes were given would have been no defence, he being of full age when the said first judgment was recovered, as appears by his bill ; and that, as the first judgment was recovered before the adoption of the present constitution, and Northrup was dead when the same was assigned, he could not have had the said first judgment docketed in the Supreme Court.

He admits that in August, 1843, Staats had considerable property in Sussex ; but says he has been informed and believes it was encumbered by prior judgments, but to what amount he does not know ; and that he is informed and believes that Rorback delayed selling the property to Staats, to satisfy his said judgment, on account of the urgent solicitations of Staats, so as not to distress him, or cause his property to be sacrificed at sheriff's sale ; Rorback having no immediate want of money ; and this defendant knows of no other reason for the delay ; and from the information he has received, denies that there was any combination or contrivance between Rorback and Northrup and Staats, or either of them, for the purpose of unjustly extorting money from the complainant.

He says that he never knew or heard, till since the filing of the complainant's bill, of the recovery of the judgment by A. A. Ackerson, mentioned in the bill, or of any of the subsequent proceedings thereon ; and that he does not know at whose instance and by whose aid or contrivance the said proceedings were

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carried on. He denies that he has ever received any assistance from Staats in any of the aforesaid proceedings; and denies that he ever received from Staats any money whatever, either to procure the said assignment, or to pay the expenses of any of the proceedings which have been had on said judgment since the assignment; but he admits that the judgment so recovered in the name of Rorback for his use, and the subsequent proceedings therein, are so far for the benefit of Staats, as that if the complainant should be compelled to pay the whole judgment, Staats would be relieved from the payment of all but what his fair proportion would be, in a settlement between him and the complainant of the said partnership transactions and the debts growing thereout.

He denies that the proceedings so as aforesaid had in his behalf have been had for the purpose of defrauding the complainant, or of depriving him of any defence he might have to the said judgment; but they have been had for the purpose already stated; and he supposes and believes, that they have been had with the knowledge and consent of Staats.

He says he does not know of his own knowledge how much was due on the judgment so assigned to him when it was assigned; but from representations made to him, he believes and charges that the whole of it was then due and unpaid; and he expressly denies that any part of it has ever been paid to him by Staats or any other person, and insists that the whole amount thereof is due to him.

The answer of Staats says that for some time prior to December, 1839, he and Northrup had been doing business in Lafayette, Sussex county, as partners in the milling and foundry business; and that in December, 1839, the complainant was taken into the firm as a partner, and the same business was continued under the name and firm of Northrup, Staats & Co.

He admits that the complainant invested \$1000, and that each partner was to share in the profits in proportion to his share of capital invested.

He admits that in May following the parties opened a store, in connection with their other business, which was carried on upon the same capital, and under the same arrangement, as to the division of the profits.

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He denies that he then knew that the complainant was a minor; and whether Northrup knew it or not he does not know; that, on the contrary, he supposed and believed that the complainant was then of age; and, to the best of his knowledge and belief, he never knew or heard of the complainant's being a minor while a member of the firm, until long after the firm was dissolved.

He says that, on or about October 1st, 1840, Northrup represented to him that the complainant was desirous to dissolve the partnership in such a manner that he, the complainant, might continue the store alone, and leave Northrup and this defendant to continue the rest of the business; but that this defendant utterly refused to do it, and insisted that he would leave the firm himself, and accordingly sold out his interest to the complainant and Northrup, and, by the agreement between them, this defendant was to receive back his capital, and \$500 for his share of the profits, and the other two were to take the assets of the firm and pay all its debts; and he says that, in two days after he had made the said arrangement and sale, some arrangement was made between Northrup and the complainant, by which the complainant sold out his interest to Northrup; but what the particulars of the said sale and arrangement were he did not then and does not now know, not having been present at nor a party to it.

He admits that, at the dissolution of the partnership, the partnership property was sufficient to pay the partnership debts.

He says that, after he made the said sale, the other parties took into their custody and possession the books, papers and assets of the firm, and afterwards, on the 10th of February, 1841, the complainant gave to this defendant some accounts which had belonged to the firm, to collect, amounting to \$172.57, to be applied, when collected, to what was so agreed to be paid to this defendant when he sold out, of which accounts he has received \$108.36; and that this is all he received of the amount so due him on the dissolution of the firm.

He says that, on or about May 11th, 1843, G. H. Coursen and E. B. Woodruff recovered a judgment in the Supreme Court, against the firm of Northrup, Staats & Co., for \$444.75 damages and costs, on which an execution was issued to the sheriff of

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Sussex, and that he paid off the said judgment, with interest, costs and execution fees, amounting, when paid, to \$488; and that, on or about May 23d, 1843, one J. B. Marsh recovered a judgment, in the Common Pleas of Sussex, against the said firm, for \$191, on which an execution was issued to the same sheriff, and that he paid off that judgment also, amounting, when paid, to \$214.92; and that he has, also, since the dissolution, paid off a note given by the firm to Jos. Strader, for \$55, dated August 24th, 1840; and has, also, since that time, paid other debts of the said firm, the amounts of which he cannot now ascertain, not being able to find the receipts for the same.

He admits that Rorback, in August, 1843, recovered a judgment in the Circuit Court of Sussex, against the firm, for the amount stated in the bill; and says that, before that suit was commenced, Rorback spoke to him about the notes on which it was brought, and that, soon afterwards, and before the suit was brought, he, this defendant, spoke to the complainant on the subject, and that the complainant did not at that time say or intimate that he was a minor when the said notes were given, or that there was any defence to the notes, but seemed to know all about them and for what they were given, and replied that Rorback had better sue on them and collect the money from Northrup as soon as he could.

He says that, in January or February, 1846, he, this defendant, being pressed by Rorback for the payment of the said judgment, and not being able to obtain any further delay from him, applied to Aber and requested him to pay the amount of said judgment to Rorback and take an assignment of it, and collect it, if he could, from the complainant; and stated to him that it grew out of the partnership debts of the said firm, and informed him that this defendant had paid a large amount of the said debts, when, according to the terms of the dissolution, he was not bound to pay any of the debts; but that the complainant and Northrup were bound to pay them; and thereupon Aber consented to take an assignment of the said judgment, and this defendant is informed and believes that the same was afterwards assigned to him by Rorback; but what he paid for it this defendant does not know; but he denies that he ever paid anything to Aber for the purpose of procuring the said assignment.

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He admits the second judgment, in the name of Rorback for the use of Aber, against the complainant and him, and says he has been informed and believes that the same has been docketed in the Supreme Court, and an execution issued thereon to the sheriff of Hunterdon.

He admits that he still resides in Sussex, and has property there sufficient to pay all his debts, but has none in Hunterdon, and believes there is none there belonging to the estate of Northrup.

He says he does not know when the complainant removed from Sussex, nor when he removed from there to Hunterdon; but he insists and charges that, before Rorback commenced the first suit, he, this defendant, informed the complainant of the existence of the debt for which it was brought.

He says that soon after the recovery of the said first judgment, Northrup's property was sold to pay prior judgments, and that Northrup died largely insolvent, and that the delay given by Rorback to this defendant was at his, this defendant's, solicitation, to prevent a sacrifice of his property, and he denies that there was any collusion between him and Rorback or Northrup, for the purpose of extorting money from the complainant.

He admits that A. A. Ackerson, on the 12th of November, 1844, recovered a judgment in the Supreme Court, against him and the complainant and Northrup, for \$693.40 damages and costs, which judgment was recovered on three notes given by the said firm, two of them to Paul Ackerson, and the other to the executors of his estate, the latter for grain sold to said firm, and the two former for money lent to the said firm, and that A. A. Ackerson was executor of the said P. Ackerson, deceased, in which suit the summons was served on him, and he believes, on Northrup, but not, as he believes, on the complainant, who then lived in Hunterdon, and that this defendant and Northrup, knowing the debt for which the suit was brought to be just, suffered judgment to go by default, and he has heard and believes that the said judgment was paid by the complainant on an execution issued to the sheriff of Hunterdon, after the complainant had, without success, applied to the Supreme Court to open said judgment and allow him to plead infancy

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He admits that, before the said suit was brought, A. A. Ackerson called on him to pay the said notes, and that he told Ackerson he ought to collect the same from the complainant, for that he, this defendant, had paid a large amount of the debts of the said firm, which, as between him and his partners, he was not bound to pay, and the complainant had not, so far as this defendant knew, paid any of the said debts; but he denies that the mode of proceeding taken by Ackerson to collect the said notes was at his instance, or by his aid and contrivance, any further than that he told Ackerson, as has been already stated, that he ought to collect the said notes from the complainant, and when served with the summons in said suit, knowing the debt to be justly due Ackerson, allowed judgment to go by default, and he denies that he has rendered any assistance to Aber in the proceedings so as aforesaid adopted by him, but he admits that they are so far for his benefit that if Aber collects the amount of the said judgment from the complainant, he will not be compelled to pay it to Aber, and it may be the means of inducing the complainant to make a full and fair settlement of the said partnership affairs and debts with this defendant, which he is anxious to have done, and which he has frequently requested the complainant to do, without success.

He denies that, so far as he knows, the proceedings had as aforesaid by Aber have been adopted for the purpose of defrauding the complainant, or of unjustly extorting money from him, or of obtaining judgment against him without his knowledge, that he might be deprived of any defence, and if any such motive existed on the part of any person, he is ignorant of it; but he admits he knew that Aber intended to collect the said judgment from the complainant, if he could, but did not know what mode of proceeding he would adopt to do it.

He says that the notes on which the judgment of Rorback was recovered are in Northrup's writing, and signed with the partnership name, in Northrup's writing, but he does not know for what they were given, or whether Northrup or the complainant had ever paid anything on said notes or on the judgments recovered thereon, and he has not paid anything himself on said notes, or on the judgments since recovered thereon, either to Rorback or Aber.

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He says he does not know, except by the bill, whether the complainant, at the time said notes were given, was a minor, but he insists that during the whole time of the partnership he supposed and believed that the complainant was over twenty-one, and that the people generally, at and in the vicinity of Lafayette, entertained the same belief; and he says he does not know whether or not the knowledge of said suits in the name of Rorback was purposely or by design withheld from the complainant, or whether or not the mode of prosecuting the complainant was adopted in order, as much as possible, to prevent the complainant from obtaining any knowledge of said proceedings until an execution should be served on him.

It was shown, on the argument, that the complainant was born in March, 1820.

S. G. Potts moved to dissolve the injunction. He cited 1 *Green's Ch.* 163, 172; 8 *Eng. Cond. Ch. Rep.* 65; 2 *Mylne and Keen* 423; 2 *Harrison's Rep.* 270; 5 *Taunton* 856; 8 *Ib.* 35, 508; 7 *Eng. C. L. Rep.* 49; 2 *Kent's Com.* 239.

A. Wurtz and *W. Halsted*, contra. They cited 7 *Cranch* 326; 1 *South. Rep.* 93; *Smith on Contracts* 101, 206, 7; *Stra.* 1083; 5 *Barn. and Ald.* 147; 2 *Maul. and Selw.* 205; 2 *Story's Eq. §§* 895, 6; 5 *Howard's Rep.* 43; 4 *Taunton* 468; 3 *Ib.* 307; 3 *Esp. Rep.* 76, 426.

THE CHANCELLOR. The injunction will be continued to the hearing.

Motion denied.

Society for Establishing Useful Manufactures v. Morris Canal & Banking Co.

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES
v. THE MORRIS CANAL AND BANKING COMPANY.

1. "The Society for Establishing Useful Manufactures," incorporated in 1791, located at the falls of the Passaic, pulled down a gate and waste-way of the canal of "The Morris Canal and Banking Company," incorporated in 1824, and discharged the water from the canal into the Passaic above the falls. The canal company repaired the breach and filed their bill against the society for an injunction, which was granted. The society filed a cross-bill, setting up an agreement entered into between the canal company and them, in 1826, for the discharge of water from the canal into the Passaic above the falls, and stating that the canal company, in breach of the agreement, had nailed down the gates of the waste-way and stopped the flow of water from the canal to the river, and thereby broke the agreement; and praying a decree for the specific performance of the agreement.

2. A demurrer to the bill was overruled.

The bill and cross-bill are sufficiently stated in the case of *The Morris Canal and Banking Company v. The Society for Establishing Useful Manufactures*, reported *ante*, Vol. I., page 203.

A demurrer was filed to the cross-bill.

W. Halsted, in support of the demurrer. He cited *Story's Eq. Pl.*, §§ 678, 631; *Hopkins' Rep.* 84; 8 *Cowen* 361; 4 *Hen. and Munf.* 423; 2 *Mad. Ch. Rep.* 356; *Ambler* 452; 1 *Bro. Ch.* 125; 1 *P. Wms.* 371; 3 *Atk.* 276; 2 *Ves., Sen.*, 193; 1 *Coxe Ch.* 102; 2 *Ib.* 4.

W. Pennington and *P. D. Vroom*, contra. They cited *Story's Eq. Pl.*, §§ 391, 394, 413, 414, 415, 419; 12 *Pick. Rep.* 34, 169; *Drury on Inj.* 237, 9, 245, 298; 10 *Ves.* 193; 7 *Ib.* 307; 2 *Atk.* 83; 1 *Ves., Sen.*, 543; 1 *Ves., Jun.*, 140; 2 *P. Wms.* 266; 3 *Ves., Sen.*, 414; 3 *John. Ch.* 287; *Drury on Inj.* 298; *Story's Eq. Pl.*, §§ 443, 628, 391; 2 *Scho. and Lef.* 199; *Mitf. Pl.* 81; *Cooper Eq. Pl.* 85, 86, 216; 1 *Ves., Jr.*, 210, 213.

THE CHANCELLOR. The demurrer will be overruled.

Order accordingly.

Hoyt v. Bridgewater Copper Mining Co.

GOOLD HOYT v. THE BRIDGEWATER COPPER MINING COMPANY AND OTHERS.

1. A bond and mortgage given in fulfillment of a prior written agreement for the sale and purchase of property, at a price stipulated, to be paid in a stipulated manner, with interest, the interest to be paid half yearly, in advance—*held* not to be usurious.

2. A new bond and mortgage were substituted for the first, dispensing with the payment of interest in advance. The Chancellor said that if he could think the first usurious, he should hold that such a contract might, by subsequent agreement of the parties, be freed from the vice.

3. Acts of a subsequent board of directors of a corporation, which were held to be a recognition and sanction of a mortgage given by a former board.

On the 13th January, 1840, Goold Hoyt filed his bill, stating that, on the 15th December, 1836, "The President and Directors of the Bridgewater Copper Mining Company," being indebted to him in \$86,378, for stock in the Bridgewater copper mines, together with certain lands and premises in the township of Bridgewater, in the county of Somerset, before then sold, assigned and conveyed to the said "The President and Directors of the Bridgewater Copper Mining Company," being the same premises described in the mortgage set forth in the bill, for securing the payment of the said sum, with interest, to the complainant, did, on the day and year aforesaid, make and execute, under their corporate seal, to the complainant, their bond of that date, conditioned for the payment of the said sum on or before the 15th December, 1838, with interest from the date thereof, to be paid semi-annually, and, at the same time, for the better securing the payment of the said sum according to the condition of the said bond, did make and execute, under their corporate seal, their mortgage, dated the said 15th December, 1836, by which, in consideration of the said sum, they conveyed to the complainant, in mortgage, the premises in the bill described.

That the execution of the said mortgage was, on the said 15th December, 1836, duly acknowledged by the said company, by their president, Peter I. Stryker, before James Taylor, Esq., a judge, &c., and that the said mortgage was duly recorded on the 12th of April, 1837.

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The bill prays foreclosure, &c.

To this bill the company put in their answer, on the 14th August, 1840, by which they say that said bond and mortgage were not given by the said company, nor by any person authorized to give and execute them on their behalf, or to affix the seal of the said corporation thereto; that the persons calling themselves the board of directors, by whose order the same were given, were not lawfully elected directors, nor had they, at the time, any power to execute the same; that the same were given by the order of Peter I. Stryker, James S. Nevius, James S. Green, and William Thompson, alleging themselves to be a board of directors of the said company, when they were not, at the time, duly elected directors; that there had been no election by the stockholders for three years and upwards, and that part of said pretended directors had never been elected by the stockholders, pursuant to the charter, but had been appointed by other directors, whose terms of office had long before expired.

They further say that, even if the said persons had been duly chosen directors, and as such, were authorized to bind the company, yet that it could only be done in the manner prescribed by the charter and by-laws of the company.

That the charter provides that a majority of the directors, for the time being, shall form a board or quorum for business, and have power to make such by-laws as to them shall appear needful and proper, touching the management and disposition of the stock and effects of the corporation; that certain by-laws were made, by which it is ordained, among other things, that there shall be a regular meeting of the board, at Somerville, on the first Tuesday of January, and at such place and in such state as may be designated by the president for the occasion, on the first Tuesday of April, July, and October, in every year; extra meetings may be held, at such place as may be designated by the president, whenever, in his judgment, the same may be deemed necessary, or whenever a requisition shall be made on him by any two of the directors to call the same. And that by the said by-laws, it is further ordained that it shall be the duty of the secretary to issue written summons for, and to attend all regular meetings of the board, and to keep a minute of the proceedings

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of the same, to be by him recorded in a book to be by him provided for the purpose.

And the defendants say that on the said 13th December, 1836, four persons claiming to be directors, viz., the said Stryker, Nevius, Green and Thompson, casually met in New Brunswick, and after pretending to make a certain compromise or arrangement with the complainant of a suit then pending in this court, agreed to make, and did make to the complainant, the said bond and mortgage; that said meeting was not a regular meeting of the board, according to the charter and by-laws, nor an extra meeting on the call of the president, or designated by him on a requisition of any two of the directors. That no written notice was ever given of said meeting to the other members of the board; but that the proceedings were had in the absence of three of the directors, and without their knowledge or consent; and the defendants insist that the corporation is not bound by the unauthorized proceedings of four persons, styling themselves a board of directors, and acting without notice to others equally interested and clothed with equal rights and privileges; that though by the charter, four directors, being a majority, form a quorum, yet that the power to act as a board is confined to such times as they shall be lawfully convened for business, either at a stated meeting, or at an extra meeting lawfully convened by the president, either on his own judgment, or on a requisition of two of the directors, and on written notice given to all the members of the board; and they insist that the said bond and mortgage, given as aforesaid, are void. And they say that the complainant, who was present at the giving thereof, was well acquainted with the charter, by-laws and situation of the company, having formerly been president of the board; and that the whole transaction was without authority, and a fraud on the company.

The defendants further say that the intent and meaning of the charter is, that the directors shall be stockholders; that at the time when the bond and mortgage were given, two of the persons present, claiming to be directors, were not stockholders, but were strangers, and had never been elected by the stockholders.

They deny that at the time of the execution of the said bond

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and mortgage, the company were indebted to the complainant in any such sum, for stock in the Bridgewater copper mines and for certain lands in Somerset before then sold, assigned and conveyed to the company; and they deny that said stock and property constitute the consideration for which the said bond and mortgage were given; but they say that the immediate consideration thereof was a certain other mortgage on the same property, given by the company to the complainant, on the 10th October, 1830, for \$65,000, which they say was usurious and void; that at the time of the giving thereof, the complainant demanded and corruptly and usuriously received, on the whole sum mentioned therein, the interest for six months in advance, at 6 per cent.; by reason whereof the said mortgage and contract were void in law.

And the defendants say that after the said mortgage became payable, the complainant instituted a suit in this court, to foreclose the said mortgage; and that the defendants, in bar of that suit, set up and insisted that the said mortgage was void for the reasons aforesaid; and that while the matter was pending, the complainant, under various plausible pretences, induced the said four persons claiming to be directors to settle and compromise the said suit; and that thereupon, the said Stryker, Nevius, Green and Thompson, without any meeting of the board having been lawfully convened, in the absence of the other directors or the persons claiming to be such, and without consultation with or direction from the company or stockholders, did, on said December 13th, 1836, make a settlement of the said suit, and on that settlement did execute to the complainant the said bond and mortgage mentioned in his bill, in fraud of the rights of the stockholders of the company.

And the defendants say that the last bond and mortgage were given for the principal and interest of the former bond and mortgage, and that the object of the complainant in staying said suit and compromising the same was to obtain a new security, in the expectation and hope thereby to avoid the legal defence of the defendants. But the defendants insist that the last bond and mortgage, being given in lieu of the former, and founded on the same illegal consideration, are void; and they pray that they

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may have the same benefit from the answer, in their behalf, as if the said matter had been specially pleaded in bar.

And they say that when the said bond and mortgage of October, 1830, were given to the complainant, he was a member of the company and president of the board; that it was agreed by the board to raise money by loan to carry on the mining operations of the company, and that for that purpose they gave the bond and mortgage to the complainant for \$65,000; and he, instead of advancing the money or any part thereof, gave to the company a promissory note of Peter I. Stryker, to the said amount, payable on demand. And they say they are informed, and they allege, that there was no such sum of money due from said Stryker to the complainant; that no part of said money was paid or raised on said note, and that the said note was, afterwards, in July of the following year, given up and restored to the said Stryker. And they say that the whole proceeding was an artifice and contrivance on the part of the complainant, the real object of which was, under pretence of aiding the company by a loan of money, to speculate on the necessities of the company, and obtain a large and productive lien on the property. And the defendants submit that, independently of the fact of usury in the first contract or mortgage, the same was inequitable, without just consideration, a fraud on the company, and especially on those who then were, or might thereafter be interested in the said company; and that the mortgage on which the present suit is founded, being a mere substitute for the former one, and having no other or better consideration, stands in the same condition, and ought not, in equity, to be enforced.

On the 15th October, 1840, Hoyt filed an amended bill, making Peter I. Stryker a party, in which, after setting out the giving of the mortgage for \$86,378, as stated in the first bill, he states that he, the said complainant, with Stephen Hoyt, Russell H. Nevius and Elisha Townsend, on the 12th August, 1830, owned stock to the amount of \$80,000 in the Bridgewater copper mines, and that they were, or one of them was, the owner of the lands then possessed by the president and directors of the said Bridgewater Copper Mining Co.

That the said P. I. Stryker, on or about that day, came to

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New York and offered to buy of the complainant and the said Stephen, Russel and Elisha, their right, title and interest in the said stock, lands, funds and property of the said company, and in satisfaction therefor, proposed to pay them \$15,000, on the 15th September then next, and to secure the payment of \$65,000, the residue of the purchase money, by a bond and mortgage on the said mines and real estate, and to pay the interest thereon semi-annually in advance, which proposition was accepted; and thereupon an agreement in writing was entered into by them, with said Stryker, for the sale of their said stock, lands and interest, for \$80,000—\$15,000 to be paid on the 15th September then next, and the balance, \$65,000, to be secured by a bond and mortgage on the said mines and real estate, payable in four equal yearly payments, with lawful interest, payable half-yearly in advance. And that afterwards, on or about October 11th, 1830, in execution of the said agreement, the complainant and said Stephen, Russel and Elihu conveyed and assigned all their, and each of their said stock, lands, funds and property to the said Stryker, or to the said company, or for their use and benefit; and thereupon, in pursuance of said agreement, the said Stryker, with one Henry Vanderveer, made and executed to the complainant and the said Stephen, Russel and Elihu, a bond for the said \$15,000, and for the balance, viz., \$65,000, which belonged exclusively to the complainant. "The President and Directors of the Bridgewater Copper Mining Co." executed to the complainant four bonds, dated the day and year last aforesaid, conditioned for the payment of \$16,250 each, the first payable September 15th, 1832, the second, September 15th, 1833, the third, September 15th, 1834, and the fourth, September 15th, 1835, with the lawful interest thereon from October 11, 1830, payable half-yearly in advance, according to the terms of the purchase aforesaid, and the said "The President and Directors of said Copper Mining Co." being then seized in fee of the lands and premises described in the mortgage first mentioned, in further pursuance of the said agreement, executed to the complainant, under their corporate seal, their certain mortgage, dated October 15th, 1830, on the before-mentioned lands and premises, to secure to the complainant the payment of the said four bonds; which said mort-

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gage was duly acknowledged by the said "The President and Directors of," &c., by the said Stryker as president of said company; and that the seal of said company had been thereto affixed, pursuant to an order of the said corporation; and that, on the 12th October aforesaid, the said mortgage was duly recorded.

That no part of the said sum, or of the interest thereof, being paid, the complainant filed a bill in this court to foreclose the said mortgage and for a sale of the mortgaged premises, to which bill the said company put in their answer, under their corporate seal, which answer was signed by said P. I. Stryker, as the president of said company.

And the complainant says, there being difficulties and disputes between the complainant and the said company respecting the validity of the said first mortgage, on or about December 6th, 1836, a compromise and settlement were made and entered into by the said Stryker, as president of the company, as their agent, and acting by their authority, and assisted and attended by Jas. S. Green, Esq., counsel of the company, who represented themselves to be fully authorized by the company to make a settlement and compromise of all matters in difference between the company and the complainant.

That, on said settlement and compromise, after correcting all errors and mistakes, and making all such deductions as the company claimed, there was found to be due the complainant, on account of the said purchases, \$86,378.

That on or about December 12th, 1836, the said Stryker produced and delivered to the complainants' solicitor a certified copy of a resolution of the board of said company, as follows: (giving the resolution.) It states that at a meeting of the board at Stelle's hotel, in New Brunswick, on the December, 1836, present Peter I. Stryker, James S. Nevius, James S. Green and William Thompson, the following preamble and resolutions were adopted. The preamble recites that a compromise and settlement had been made, and that, after correcting all errors and mistakes, and crediting all payments, and making such deductions as the company claimed a right to have made on account of the purchase for which the company had theretofore given their bonds and mortgage on their real estate, lands and property in

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Somerset, there was justly and legally due and owing him, from the company, \$86,378, for and on account of the said purchase; and that the company had agreed to give their bond and mortgage to secure the said sum; and the resolution is, that a bond and mortgage be given by the company to the complainant, for the payment of the said sum in two years from the 15th of that month, with legal interest thereon to be paid half-yearly from the date of the said bond and mortgage; and that the president be authorized to execute, under his hand and the corporate seal of the company, the said bond and mortgage on the lands and property theretofore mortgaged to him; and that, after said mortgage should be recorded, the said bond and mortgage should be delivered to the complainant or his attorney, on the canceling the former bond and mortgage. This preamble and resolution are signed "W. Thomson, Sec. B. C. Mining Co."

And the complainant says that, in confidence of the good faith, &c., and of the authority of the said board, and not having the least suspicion that the validity of the said bond and mortgage of December 15th, 1846, would or could be questioned, the said original mortgage was delivered to the said Stryker, at his request.

And the complainant says he is informed and believes that said Stryker, as president of the company, and by the direction of the board of directors of said company, after a considerable lapse of time, caused the said original mortgage to be canceled of record, in order that the company might be able to procure a certificate that there was no mortgage on the said property but the last one so given to the complainant as aforesaid; and that they did procure such certificate, and have repeatedly used it, in Europe and in the United States; and that the said company have always, until a few months past, recognized the validity of the said last-mentioned mortgage, and acquiesced in the said settlement and compromise, and have, from time to time, applied to the complainant not to put said last-mentioned mortgage in suit; and have obtained time by assurances that they were in hopes of selling the premises, and that the whole debt due from the company to the complainant should be paid.

That when said compromise and settlement was made, the

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said Stryker was president of the board, and had been, for several years, a large stockholder, and the principal and most active man in the management of the affairs of the company, and also as the duly authorized agent of the company in the transaction of their business ; and that, when he executed and delivered the said second mortgage, and when he obtained the first, and caused it to be canceled, he represented himself as acting in the name and behalf of the company, and as duly authorized by them to execute and deliver the said second mortgage to the complainant ; and that it was on the faith of his said representation, and of the said resolution, and the complainant's and his solicitor's perfect confidence of the probity of the gentlemen whose names are mentioned in it, that said Stryker obtained the said original mortgage from the complainant's solicitor ; and that, if the said second mortgage is invalid from any cause, the said first mortgage ought to be considered in full force, the same having been obtained from the complainant by fraud and imposition, or delivered to the said Stryker under the influence of mistake and full faith in the supposed goodness of said second mortgage.

That the defendants pretend that the said first mortgage was usurious, for that, at the time of giving the same, the complainant corruptly agreed for and received, on the whole, \$65,000, the interest for six months in advance, at the rate of 6 per cent. per annum, and thereby corruptly and illegally agreed for and received more interest than at the rate of 6 per cent. per annum ; but the complainant charges that the said contract and mortgage was not usurious, and that it was not corrupt or illegal, on a *bona fide* contract for the sale of property, as that was, to agree for and receive interest in advance on the purchase money.

That the said contract was a *bona fide* one for the sale of stock and other property, and not for the loan of money ; and that he sold the said property upon the express terms of payment that, as \$65,000 of the consideration money was to be paid by installments at distant days, the interest should be paid semi-annually in advance, as expressed in the said first mortgage ; and he denies that the said sale, or the said stipulation, was a shift or device to cover or conceal usury, or that the said first mortgage was tainted with usury, or void in law.

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That, if the said agreement for the payment of the interest in advance was usurious or illegal, there was no corrupt intention on his part to agree for or take illegal interest; and that, notwithstanding he was advised by his counsel that the said mortgage was not tainted with usury, yet, as the defendants complained that the said agreement for the payment of interest semi-annually in advance was illegal, he consented to reform the original contract in that particular; and it was mutually agreed, at the time of the said settlement and compromise, that the said stipulation in the said first mortgage and bonds should be rescinded and waived, and that any excess of interest which the complainant had received, on the said original contract and mortgage, beyond the rate of 6 per cent., should be deducted and allowed for in ascertaining the amount for which the new mortgage and bond were to be given; and that a calculation was made accordingly by the said Stryker, and the excess of interest which it was alleged had been received, in consequence of the said stipulation for the payment of interest in advance, was deducted and allowed for to the company; and that no usurious interest on the original contract or mortgage was included in the said second mortgage.

The complainant insists that, if there was anything objectionable in the original contract and mortgage, yet, as that was one of the matters in difference between the complainant and the company, and one of the errors and mistakes complained of by the company, and was corrected and allowed for by mutual consent and agreement, before the giving of said second mortgage, and no usurious interest was included therein, the said second mortgage is entirely free from the objection of usury.

That the said Stryker, ever since the organization of the company, has acted as their authorized agent in transacting its business and in entering into contracts for said company; and that his acts as such agent are binding on the company; and that the said Stryker, Nevius, Green, and Thompson, for a long time, both before and after the passing of said resolution, claimed to be, and acted as directors, as by the book of minutes of the board will appear; and that they were assembled in the usual way in which the said board have been accustomed to assemble;

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and, therefore, as directors *de facto*, their acts, being done under color of right, are binding on said corporation, and cannot be vacated for irregularity in the election of some of them, or for any want of formality in the assembling of the board, if any such irregularity or informality existed, of which the complainant had no knowledge or notice, and which he does not admit; that the proceedings of the said board in passing said resolution, and the validity of said second mortgage, were acquiesced in for years by the company, and until the complainant could no longer be put off by promises, &c., when a change of president and directors was contrived, as a plan to defraud the complainant out of his debt; and the complainant insists, that if the said second mortgage shall be deemed void on any such pretences as last aforesaid, the first mortgage ought to be considered in force, as having been obtained from the complainant and wrongfully canceled, either by fraud or mistake.

This bill prays that the said company and Peter I. Stryker, may answer, &c., and that the said Stryker, who is made a party to this bill for the purpose of discovery, may further set forth and discover whether he was not, in December, 1836, president of said company, and when he was first appointed president, and when he ceased to be such, &c., and whether he did not act in behalf of said company in making said settlement and compromise, and whether he was not assisted therein by Jas. S. Green, the counsel of the company in that business, &c., and whether the said certificate did not state the existence of the said second mortgage as an encumbrance, and whether the said certificate was not produced to the board of directors, and when and how often, and what they ordered to be done with it, and that the said company may be decreed to pay said second mortgage, or, if it shall appear that the said second mortgage is invalid, the said first mortgage may be decreed to be in force, and to have been obtained and canceled by fraud or mistake, and that the company may be decreed to pay the same.

Stryker's answer to this bill was filed in June, 1842. In it, after admitting that the complainants are possessed of said second mortgage, he admits that about August 12th, 1830, an agreement was entered into between him and Stephen Hoyt, acting for

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himself, and representing himself as acting for the complainant and Nevius and Townsend, whereby the said Hoyts and Nevius and Townsend agreed to sell to him, Stryker, all their interest in the stock of the Bridgewater Copper Mining Company, for \$80,000; and he agreed to buy the same at that sum, and to pay \$15,000 on the 15th September, then next, and the residue in five years, with interest, payable half-yearly, in advance; the principal of which to be satisfactorily secured, as will appear by a certain article of agreement in writing between said parties.

That by a subsequent agreement, also in writing, and which was made a part of the original agreement, it was agreed that the said sum should be paid in four equal annual payments, instead of five, and that the interest thereon should be paid semi-annually, in advance.

That, in compliance, &c., he, on the 15th September, 1830, gave to Stephen Hoyt, acting for himself and his associates, a bond executed by him and one Henry Vanderveer, for \$15,000, payable September 15th, 1831, in part fulfillment, &c.; and that at or about the same time, in further compliance, &c., he gave his own note for \$65,000.

That it was agreed by and between the said parties, at the time of making the said agreement, that not only the stock of the Hoyts and Nevius and Townsend should be transferred, but that the possession of the mines and real estate of the said company, of which the said Gould Hoyt was president, should be delivered up to him, Stryker, so that he might have the benefit of his purchase.

That said G. Hoyt and his said associates put off the consummation of the contract, on their part, till about October 11th, 1830; and that between said September 15th and October 11th, 1830, the said G. Hoyt and his said associates, or some or one of them, surrendered all their possession and right of possession of said mines and property to a third person, thereby disabling themselves from honestly and fairly executing their said contract; that he had no knowledge of said surrender; that he relied implicitly that said Hoyt, &c., would fairly carry out the said agreement, and thus enable him to carry on the mining operations, either by himself or by others, which was his object and

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intention at the time of entering into the said contract.

That the possession of said mines and real estate has not been delivered to him, or to any other person in his behalf, or for his use and benefit, according to the understanding of him, said Stryker, and the true construction and intent of the said agreement; but the mines and real estate were delivered into the hands of another person, in consequence of which and by whom, he was deprived of that control of the property which he expected to enjoy and ought to have had.

That, about this time, a negotiation for a loan was had and carried on between the Bridgewater Copper Mining Company and the said G. Hoyt, the particulars of which he cannot state from memory, but for which he refers to the minutes of said company as referred to by complainant. That the company agreed to give said G. Hoyt four bonds, for \$16,250 each, payable on the 15th of September, 1832, and on the same day in each of the three succeeding years, with lawful interest from October 11th, 1830, payable half yearly in advance, secured by a mortgage on the mines and property of the said company, and thereupon to take up and receive the said note for \$65,000 so given by this defendant on his contract above set forth; and thereupon, on the 11th October, 1830, the company executed such bonds and mortgage to said G. Hoyt, and the said note was thereupon delivered over to the said company; and that these are the bonds and mortgage described in the complainant's bill as having been given and received for the balance of the purchase of said property.

And the defendant submits that the said bonds and mortgage, whether founded on an agreement for a loan, or given in part for the purchase money of the said property, being founded on a corrupt and usurious agreement, to take from him more than legal interest, were void. That in pursuance of such agreement, the said G. Hoyt actually received \$1950, one-half year's interest, in advance, on said \$65,000.

He admits that the answer of the company to the complainant's foreclosure bill on this \$65,000 mortgage, was signed by him as president of the company, and he presumes he made the usual affidavit that he was president.

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That, about the same time, the said G. Hoyt sued him and Vanderveer on the said bond for \$15,000, in the Supreme Court, and also brought an ejectment, in said court, against Augustus F. Camman and others, to recover possession of said mortgaged premises.

That to the foreclosure suit the company set up usury as a defence.

That the same defence was set up in the said suit on the said \$15,000 bond.

That the said suits remained a long time pending, till, at length, the said G. Hoyt agreed to abandon and discontinue all the said suits, on condition that the costs thereof should be paid; and, thereupon, he, the defendant, paid to the attorney and solicitor of said G. Hoyt \$150, the costs agreed to be paid on the discontinuance of the said causes.

That, shortly after, to his surprise, he, the said Vanderveer, was sued on said bond for \$15,000, in the Circuit Court of the United States, and that he employed an attorney to make the same defence as had been made in the former suit; that the plea was prepared and filed, but owing to some misapprehension of his attorney as to the practice of that court, the plea was not filed in season, and judgment by default was entered, and execution issued and placed in the hands of the marshal, and by him levied on the property of this defendant.

That application was made at the next stated term of said court to open the said judgment and permit the defendants to plead, or that the plea they had filed should be received.

That the court did not grant the said application, but doubted and took time to advise. That this defendant, alarmed, &c., was advised, by way of relief, to submit to these terms, to wit, that the execution should be withdrawn, and one year's indulgence given to him, on condition that he would withdraw the plea of usury, and cause a new mortgage to be given for the said sum of \$65,000, and the interest thereon, in place of the said mortgage for that sum given in October, 1830.

That he reluctantly complied with this advice. That the complainant thereby escaped a legal defence, and this defendant was placed in his power, with a judgment against him for \$15,000,

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for which he had received no just or valuable consideration, such as he had reason to expect when the said bond was given.

That some time after the expiration of the said year, the said G. Hoyt, on *scire facias*, obtained and issued execution on the said judgment, and the property of this defendant was sold under the said execution.

That it was under the pressure of this judgment that the compromise set forth in complainant's bill took place.

That the complainant, feeling he had power over this defendant, who was then president of the said company, (a mere nominal office, there being no business carried on by the company,) pressed to obtain a new mortgage at the hands of the company, in place of the old one which he knew was usurious and void.

He admits that the said second mortgage was executed by him, as president of the board of directors of said company, and under the corporate seal of said company; but he denies that he was, at the time, acting as the agent of the company, any further than such agency may be implied from his acting on that occasion as president of the board, or that he had any special authority for that purpose.

That, satisfied as he was, he acted, probably, without due consideration in the matter, and intended faithfully to carry out his agreement, and supposed that the company would ratify the act.

That, without access to the minutes of the board, he cannot state when the last election for directors, prior to the giving the last bond and mortgage, took place, but remembers that from about October, 1830, no mining was done by the company. Annual elections were not regularly held according to the charter, and there was little or no business to be done, the company not being in possession of the mining premises.

That on or about December, 1836, this defendant and J. S. Nevius, J. S. Green, and William Thompson, all of whom this defendant believes had been elected directors of the company at some previous time, but when, he cannot say from recollection, met in New Brunswick, and the resolution set forth in complainant's bill was then and there passed and adopted.

That the meeting was informal and irregular; the notice required by the charter and by-laws not having been given, and the

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directors who were absent not having been in any way notified of the meeting.

That the said G. Hoyt was present, either personally or by the agency of his son, and must have known from the circumstances, as this defendant supposes, that the said meeting was not convened according to the charter and by-laws.

That he does not know whether said Green or Nevius was a stockholder at the time. He believes that said Green had met with the board on one former occasion, but thinks said Nevius never had.

That he don't recollect any previous instance in which business was transacted by the board in such an irregular way, and denies that it was usual for the board to assemble in this irregular way for business; and that it was done so at this time owing, principally, if not entirely, to the urgency of the complainant to have the mortgage given and the convenience of getting said Nevius, Green and Thompson together, at that time, at New Brunswick, it being court time there.

That he don't recollect of any deductions being then made, except for payments and for excess of interest; yet it is possible other deductions may have been made, but what they were he does not remember, and cannot state. His impression is that the said mortgage was given as a substitute for the first, deducting the payments and excess of interest.

That he was elected president of the company in 1830, and again in 1838. That he ceased to be president the following year, and is now a director.

That in 1830 he usually attended the meetings of the board, which were few, but he took little part in their business, as the company had not possession of the said mines or mining premises at that time, or at any other time previous to the new organization of the board in 1838.

That the charge in complainant's bill that this defendant, ever since the first organization of the board, has acted as the authorized agent of the company in the management of its affairs and the making of contracts, is not true.

That, though this defendant owned considerable stock in the company, he does not recollect of any agency in which he was

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employed by the company or under its authority previous to 1838.

That he, as president of the company, caused the said first mortgage to be canceled of record, and that a certificate was thereupon procured from the county clerk that there were no other mortgages on the said mining property but the said mortgage of 1836, and such certificate may have been used in Europe and in this country, to enable the company to procure a loan or sell the property; but whether the said company have, from time to time, or at any time, recognized the validity of said mortgage, or have applied to the complainant not to put the same in suit, and have thereby obtained time, he has no personal knowledge, and therefore leaves the complainant to his proofs.

That, by the resolution set out in the complainant's bill, the said second mortgage was to be delivered to the complainant on canceling the said first mortgage and bond; yet, though the second mortgage was delivered to the complainant soon after it was registered, the complainant neglected and refused to deliver up the first mortgage and bond for a long time, and, as he believes, for 18 months, during which time both appeared as encumbrances, to the great detriment of the company.

That he has no knowledge of any device to change the president and directors of the company to cheat and defraud the complainant out of a just and honest debt; the change of officers was a natural consequence, as he supposes, of a change in the ownership of stock which took place prior to the organization of the board in 1838.

Replications were filed, and testimony was taken.

B. Williamson, for the complainant. He cited *Saxton's Ch.* 541, 550; 1 *Hoff. Ch. Pr.* 553; 3 *Paige* 407; 1 *Ib.* 430, 3; *Cro. El.* 25, 104; 4 *John. Ch. Rep.* 332; 8 *Wheat.* 354; 3 *Peters* 40, 2; 2 *Cowen* 664, 678, 704, 763; 15 *John. Rep.* 168; 4 *Wend.* 655; 4 *Yates* 220, 3; 9 *Mass. Rep.* 49; 3 *Bos. and Pul.* 158; *Cro. J.* 26; 2 *Pen. Rep.* 908; 1 *Halst. Rep.* 116; 8 *John. Rep.* 85; 4 *Tenn. Rep.* 613; 3 *Cowen* 284, 290; *Cooper's Ch.* 231; 3 *Eng. Com. Law Rep.* 109; *Comyn on Usury* 36, 95.

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P. D. Vroom, for the defendants. He cited *Angell & Ames on Corp.* 278, § 5; *Ib.* 76; *Comyn on Usury* 183, 4, 190; *Cro. El.* 20.

THE CHANCELLOR. On the 12th August, 1830, an agreement was made between G. Hoyt, Stephen Hoyt and Nevius and Townsend, of the one part, and Peter I. Stryker, of the other part, to be completed on or before 15th September, then next, by which the parties of the first part agreed to sell to said Stryker all their interest in the stock of "The Bridgewater Copper Mining Company," for \$80,000, and the said Stryker agreed to buy the same at that price, and to pay \$15,000 thereof on or before the said 15th September, the residue, \$65,000, to be paid in five years from that date, with interest on the same, payable half-yearly, in advance; the payment of the principal to be satisfactorily secured, either by a mortgage on the real estate of the said company, if that can legally be done, or in some other satisfactory manner. And the said Stryker agreed that he would, on or before the said 15th September, agree with them that in case the said interest on the said \$65,000 should not be paid when it should become payable as above mentioned, or within one month thereafter, he, the said Stryker, would give up to them, on demand, quiet possession of all the property, real and personal, belonging to the said company, and reconvey to them all their interest in the stock of the company, in full discharge and satisfaction of the said \$65,000; and that said Stryker was not to be held personally responsible, in his private property, for the said sum of \$65,000; that on said Stryker's paying the said \$15,000, and executing the said mortgage, or giving other satisfactory security, the said Hoyts and Nevius and Townsend would convey to him, by a transfer on the books of the said company, or otherwise, all their interest in the stock of said company; that if the said \$15,000 should not be paid on or before the said 15th September, the payment thereof should be satisfactorily secured, and that no stock was to be transferred till the same was paid; and that the said \$65,000 was to be paid in four equal yearly payments, on the 15th September, in the years 1832, 1833, 1834 and 1835, respectively.

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At the foot of this agreement appears, of the date of September 15th, 1830, a receipt as follows: Received on the within agreement, a bond executed by P. I. Stryker and Henry Vanderveer, of this date, for the within mentioned sum of \$15,000, payable September 15th, 1831, in part fulfillment of the within-mentioned agreement.

A special meeting, called by order of the president, was held October 10th, 1830; present, G. Hoyt, Townsend, Hardenburgh and S. Hoyt. The president presented the resignation of J. I. Hoyt as a director, which was accepted, and T. A. Hartwell was elected by the board to fill the vacancy. Mr. Townsend presented the resignation of Mr. Nevius, which was accepted, and Peter I. Stryker was elected by the board to fill the vacancy. G. Hoyt tendered his resignation as a director, which was accepted, and P. I. Stryker was then elected president of the board, and George Wood was elected a director in the place of G. Hoyt. Mr. Townsend then offered his resignation as a director, which was accepted. It was then resolved that the company consider it expedient "to raise funds on bond and mortgage, to put the works in operation, and carry on the same;" and a committee was appointed "to endeavor to effect a loan for that purpose, and report to the board forthwith;" and the minutes say the committee retired, and soon returned and reported "that they can effect a loan for that purpose by taking a note of P. I. Stryker, payable on demand, with interest, for \$65,000, and recommend that the company receive the same as cash, and execute to Goold Hoyt the company's bonds and mortgage for that sum, payable in four equal payments; one quarter part thereof on the 11th October in the several years of 1832, 3, 4 and 5." The board accepted the report, and ordered the bonds and mortgage to be executed accordingly. They then elected William Thompson a director, in the place of E. Townsend, who had resigned, as before stated. Stephen Hoyt then resigned as secretary, and William Thompson was elected secretary. It was then resolved that Stephen Hoyt (the late secretary) give an order on Jeremiah Parsell to deliver into the possession of the new secretary of the company all the property in his possession belonging to the company; and that he deliver to the secretary all the

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books and papers belonging to the said company.

There is endorsed on the agreement before set forth, of the date of October 11th, 1830, a writing signed by G. Hoyt, by which he acknowledges to have received from the said company their bonds and mortgage for \$65,000, and the bond mentioned in said agreement for \$15,000, in full of P. I. Stryker's note for \$65,000, and also in full satisfaction and discharge of P. I. Stryker from all the stipulations and conditions of the said agreement.

At a meeting of the board, held the first Tuesday of July, 1831—present, Stryker, Camman, Green, Gaston and Thompson—it was resolved, "That the promissory note given by Peter I. Stryker to the company be given up to him."

At a meeting of the board, on the 13th December, 1836, a preamble and resolution were adopted, stating that a compromise and settlement between G. Hoyt and the board had been made, and that after correcting all errors, and crediting all payments, and making such deductions "as the company claim a right to have made, on account of the purchase for which this company heretofore gave their bonds and mortgage on their real estate, lands and property, there is legally due and owing him from this company, \$86,378, for and on account of said purchase, and to secure the payment of which sum, with interest, this company have agreed to give their bond and mortgage;" and resolving that a bond and mortgage be given by the company to said Hoyt, accordingly, payable in two years from December 15th, 1836, with interest half yearly, and that the president be authorized to sign and execute the same under the corporate seal of the company, on the lands and property theretofore mortgaged to said Hoyt; and that after the said mortgage shall be recorded, the said bond and mortgage be delivered to said Hoyt, or his attorney, on the cancellation of the said former mortgage, and the bonds accompanying the same.

At a meeting held on the 20th February, 1838, a supplement to the charter was passed, authorizing the company to increase their capital stock in any sum not exceeding \$500,000; and that any stockholder may be eligible as director; that a share shall be \$50 instead of \$500; and that the number of shares shall be

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increased in the same proportion as the amount of a share therein is lessened by the supplement.

At a meeting held October 16th, 1838, it was, among other things, resolved that "Professor Pattison and J. W. Odenheim (directors) be a committee to negotiate with Goold Hoyt respecting the claim he professes to have on the company's mines, and a certain bond given by P. I. Stryker and Henry Vanderveer, for \$15,000, to said Hoyt, as part of the consideration of said mines; and the said committee are instructed to obtain, as far as may be, such indulgence in the payment of the above sums as the convenience of the company seems to require.

From this history, it is manifest that the transaction out of which the first mortgage arose, was not a loan, but a contract of sale and purchase; and one of the terms of the contract was, that the interest should be paid half yearly, in advance. Is this usury?

I am not aware that this question has ever been presented to our courts, and I have found no case in which the distinct question has ever been decided. It is settled that banks, in loaning money, may take interest in advance, on discounting notes in their usual course of business; and it is held in New York and Massachusetts that this may be done by others, as well as banks, on negotiable paper, unless the time it has to run is so long as to afford a presumption that usury was intended.

In the case of *Marsh v. Martindale*, 3 Bos. & Pul. 158, a bill at three years was discounted, and the interest for the whole period was taken in advance, or discounted.

In delivering the opinion of the court in that case, Lord Alvanley says: "It was contended (by counsel) that the transaction was, to all intents, a purchase of an annuity; and this was certainly the strongest ground the plaintiff could take, for it has been determined, in all the cases on the subject, that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But if the transaction respecting the annuity be only a cover for the advancement of money by way of loan, it will not prevent the securities from being void." In that case, his lordship said there was no idea between the parties of anything but a loan of money, and that it was impossible to wink

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so hard as not to see what the real transaction was.

In the case in hand, there is no room for the idea of a loan of money. The bonds and mortgage were given in fulfillment of a prior written agreement for the sale and purchase of property, at a price stipulated, to be paid, with interest, in a stipulated manner.

If the interest for the whole time these bonds had to run, was to have been paid in advance, perhaps the court might consider that the parties made the transaction the subject or occasion of a contract between them for the loan or forbearance of money at an usurious rate of interest. But the contract was, that the interest should be paid half yearly, in advance. To constitute usury, there must be an unlawful or corrupt intent. 7 *Johns. Ch. R.* 77; 2 *Call.* 110; 1 *Beat.* 287, 289.

I am of opinion that the transaction furnishes no sufficient evidence of such intent. It is hardly possible to suppose that the seller thought the contract was tainted with a vice which would subject him to the loss of his whole property.

I am unwilling, therefore, to say that the first mortgage was void. But, if I could think it was, it strikes me it would be peculiarly a case for the application of the doctrine that such a contract may, by subsequent agreement of the parties, be freed from the vice. 10 *Wheat.* 367.

The second mortgage given in this case was, I think, recognized and sanctioned by the board of directors after it had been given. The old mortgage was procured from Hoyt, and canceled; a certificate was obtained from the clerk of the county, for the purposes of the company, after the cancellation of the first mortgage, to show that no other mortgage existed on the property of the company except the second mortgage, and, in October, 1838, a committee was appointed by the board to negotiate with Hoyt, and obtain such indulgence in the payment of his claims as the convenience of the company seemed to require. This makes it unnecessary for me to examine several questions debated at the bar, touching the validity of the second mortgage.

One objection to it was, that one of the four directors by whom it was ordered to be given, was not a stockholder. The original charter does not say that the directors shall be stockholders; and

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if none but stockholders could be directors, the company was not originally lawfully organized, inasmuch as two persons took the whole stock and proceeded to elect seven directors; and there is nothing in the cause to show that either of the other five directors elected were then stockholders. I am inclined to think that, under the original charter, it was not necessary that directors should be stockholders. The supplement was not passed till after the second mortgage was given.

The next objection to the validity of the second mortgage was, that there was no legal meeting of the board at the time it was directed to be given. It is certainly true that a mere accidental assembly of a majority of persons who are directors of a company does not make a board; and if a lawful board had at once repudiated this second mortgage, perhaps the best ground that could have been taken to maintain its validity would have been the production of the minutes of the board, to show that, notwithstanding the requirements of the by-laws, extra meetings were constantly called without notice to all the directors. It seems to have been the uniform practice for four or five to get together on the call of the president, and transact important business.

The next objection taken was, that no election for directors had been held for several years before the giving of the second mortgage. The charter says that the corporation shall not be deemed to be dissolved in consequence of an omission to elect directors at the time, &c.; but that it shall be lawful to hold such election on such other day as shall be prescribed by the by-laws and ordinances of the corporation.

Does the power to transact business remain in the old board? If so, how long? The books are not entirely agreed on this subject, and, from the view I have taken of the case, it is not necessary to discuss the question.

The Chancellor intimated that in this case, and under the circumstances attending it, it would be inequitable to allow the complainant to recover more than the \$65,000, and interest thereon from the date of the first mortgage, deducting any interest that may have been paid.

The second mortgage was taken as a substitute for the first,

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and with a view of relieving it from an objection to its validity by reason of its requiring the interest to be paid half yearly in advance ; and was given, no doubt, principally for the purpose of obtaining the two years' delay. If the first mortgage was void, the complainant would have lost the whole. If it was good, there was no occasion for taking a second mortgage ; and if the complainant could have been assured that the first mortgage would be sustained, he would not have thought of asking a new one in the place of it. Should he, then, when taking a new mortgage, to relieve his first mortgage from objection, because by it he got the trifling advantage of the use of a half year's interest, impose the terms or condition of converting the whole interest then due, twenty odd thousand dollars, into principal? I can hardly suppose it was demanded by the complainant. It is more probable that the new mortgage was given in that shape without reflection, and under the idea that it could be paid within the two years mentioned therein for its payment.

The solicitor and counsel for the complainant consented to take a decree in accordance with this intimation.

Decree accordingly.

AFFIRMED, 2 Hal. Ch. 625.

CITED in Morris v. Taylor, 8 C. E. Green 443.

HIRAM HUTCHINSON v. PETER C. ONDERDONK.

1. R. had, during the continuance of a partnership between H. and O., loaned money, from time to time, to the firm, for which he charged and received the interest; and had, also, from time to time, endorsed notes for the firm which were paid by the firm. On the dissolution of the partnership, the settlement of its affairs devolved on O., and in an account subsequently presented by him to H., he claimed an allowance of \$500 for R., for endorsing for the firm, and claimed that he and H. had agreed to make the said allowance to R. There being no satisfactory proof that the \$500 had actually been paid by O. to R., the court refused to allow it.

2. The partner on whom, upon a dissolution of the partnership, the settlement of its affairs devolved, is entitled to a reasonable compensation for his services.

The bill states that on the 15th December, 1835, the complainant and defendant entered into partnership in the india rubber manufacturing business, each to receive half the net profits, and bear half the losses.

That said partnership was carried on until June 18th, 1840, when, by indenture between them, of that date, it was agreed that the partnership should be dissolved, and the complainant, by the said indenture, granted and assigned to the defendant all the machinery, fixtures, stock, materials, goods, and merchandise belonging to the firm, and all the bills, bonds, notes, book accounts, and writings appertaining thereto, with full power to said defendant to sue for and recover said claims and debts, and give acquittances therefor, and to sell and dispose of the said goods and merchandise; the complainant reserving to himself the right to visit the factory, inspect the books, and advise and consult in the settlement of the concerns of the partnership. And, in consideration thereof, the defendant, by the said indenture, agreed to pay off and discharge the debts due from the partnership; to pay off certain individual notes of the complainant and certain rent and family expenses in said deed specified; and after making certain necessary and proper deductions in said deed mentioned, to pay over to the complainant the one-half of the surplus moneys to be realized out of the effects of the partnership. And it was thereby further agreed that the defendant

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should continue the business of said firm on his own account ; and if, at any time during the months of January and February then next, the complainant should conclude to take and carry on the said business for himself, then, upon signifying his intention in writing to that effect, the said indenture provided that the defendant should fix a price on all the machinery, fixtures, stock, and materials he might then have on hand, which he would be willing to give or receive for the same ; and that it should be optional with the complainant to buy or sell out the same for such price.

That, notwithstanding the said agreement for dissolution, the complainant and defendant continued to carry on the said business, in New Brunswick, at their said factory, on the same terms as before, except that the business was carried on in the name of the defendant, and for that purpose a new set of books was provided by him, and the entries therein were made in the name of the defendant, but upon the joint account of himself and the complainant, in all matters wherein they were jointly interested in carrying on the business aforesaid, until December 24th, 1840, when the partnership was finally dissolved by mutual agreement.

That on said final dissolution the complainant became the purchaser of all the right, title, and interest of the defendant in and to the machinery, stock, fixtures, materials, goods and merchandise then belonging to the partnership, for a price named by the defendant in the mode specified in the indenture above mentioned, which price was duly paid to the defendant, and the complainant then took sole possession of the said stock, &c., and of the said factory, and thenceforward carried on the said business, without being in any wise connected therein with the defendant.

That, on the said final dissolution, an inventory was made of the claims and demands of the partnership, including bills, notes, book accounts, &c., intended to embrace all the claims, demands, &c., of the partnership, as well those contained in the books kept in the name of the defendant as those contained in the first set of books of the partnership ; a copy of which inventory is annexed to the bill.

That the said claims and demands, book accounts, &c., in said inventory contained, and all other claims and demands of the

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partnership, together with all the books, vouchers, and other papers relating thereto, were taken and received by the defendant for the joint benefit of him and the complainant; the defendant, upon receiving the same, undertaking and agreeing with the complainant to collect the same, and appropriate the proceeds in payment of the debts of the firm, and the surplus, if any, to divide, equally, between himself and the complainant, pursuant to the provisions of the said parol agreement for the final dissolution; as by the said inventory and the receipt and agreement thereunder written, signed by the defendant, will appear.

The bill then sets out certain claims due the firm which had been divided between the complainant and defendant, by agreement in writing signed by them.

It then states that, since the final dissolution, the defendant has proceeded to collect the assets of the firm, and has received large amounts of money for and on the joint account of himself and the complainant, as well out of the assets in said inventory specified, as out of other assets belonging to the firm, but by oversight and mistake, omitted to be stated in said inventory; and has converted the same to his own use, without rendering to the complainant any just account, or paying over to him, from time to time, his equal half of the surplus money, after paying off the debts aforesaid, except on the single occasion when he paid to the complainant \$335.50, but without stating any account, or otherwise showing the complainant the amount collected or debts paid, or making any exhibit of the real situation of the said assets.

That the defendant retains all the books aforesaid, and will make no effort to correct the manifest errors and mistakes in the said inventory, nor permit the complainant to do so; but refuses to come to a final settlement with the complainant respecting the partnership accounts, or to pay over to the complainant any further sum collected or to be collected by him out of the assets of the partnership.

The bill states that the complainant, on the dissolution of the partnership, was willing and desirous, and offered to the defendant gratuitously to take upon himself the burden of collecting and paying the debts, and settling the affairs of the partnership,

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and paying over the proceeds in the manner above stated, and to take into his charge and keeping, for that purpose, all the assets of the firm, and the books, vouchers, and papers concerning the same ; but that the defendant declined the said offer of the complainant, and voluntarily and of choice took upon himself the said burden, and then faithfully promised the complainant to discharge gratuitously the duties of said office ; to wind up the concerns of the partnership ; to come to a fair settlement with the complainant ; to pay over to him his just share of the surplus, and deliver up to him, thereupon, the partnership books, vouchers, and writings, as the continuing partner in the said business.

The bill prays an account, &c.

The defendant, in his answer, admits the partnership, and that, on the 18th June, 1840, it was dissolved by mutual consent ; and that a deed of dissolution was then made and executed.

He admits that, after said deed of dissolution, the business of the firm was still further carried on, for the benefit of the firm, in his name, and that a new set of books was obtained by him for that purpose ; but he denies that the business was conducted on the same terms, precisely, as before the dissolution in June, 1840.

He says that, at the time of the execution of the deed of dissolution, the complainant was indebted to divers individuals, among the rest, to one Samuel Reamer, who had a judgment against him in the county of Middlesex, for several hundred dollars ; that the complainant avoided being seen or going in said county at the time, for fear of being arrested ; that the complainant had become, and was at the time indebted to the firm in \$3300, or thereabouts, by means of which circumstances, among others, the defendant became dissatisfied with the existence of the partnership, and sought to have it dissolved, which was finally accomplished by the said deed of dissolution. And though the defendant continued the business in his own name from the date of said deed until the 24th December following, yet everything done by him in the business, was done with a view to the speedy winding up and final settlement of the partnership business. That the complainant, during that time, had nothing to do

in the management of the concern. That the business done consisted almost entirely in the collection of the debts due the firm and the disposition of the old stock which they had on hand. And that the assignment of all the property, by said deed of dissolution, and the surrender of the complainant's right thereto, was to enable this defendant to indemnify and protect himself, by the exclusive management of the property and assets, against the aforesaid indebtedness of the complainant to the firm.

He admits that on said 24th of December, when a final separation took place, the complainant did become the purchaser, as stated in the bill, and paid for the same and took possession, as stated in the bill.

And he admits that, after the sale and transfer last aforesaid, an inventory was made by the complainant himself, in his own handwriting, intended to include all the bills, notes, books of account and other claims due the firm, accruing either before the dissolution, or between that time and said 24th of December, when the actual separation took place.

He admits that the bills, notes, books of account, &c., mentioned in said inventory, together with the vouchers, papers, &c., relating thereto, were taken possession of by him, for the purpose of collecting and liquidating the same, and, after making proper deductions and payments, to divide the surplus, if any, equally between him and the complainant.

He admits that Schedule A, annexed to the bill, contains a true copy of said inventory, except that the following items are twice inserted in said schedule (giving eleven items, amounting, together, to \$1237.32), and that the following items are erroneously inserted in said schedule, the same being claims due this defendant on his individual account, and not due to the firm, to wit, John Onderdonk, \$17.99; Peter P. Runyon, \$3.50; and that there is a mistake of 25 cents in the sum entered as due from I. Q. Spader, which corrections being made, leaves the amount of the nominal value of the said inventory \$7755.16.

He admits that he has, since said deed of dissolution, collected and received the claims specified in complainant's Schedule A, corrected as above, except, first, the items stated in the bill to have been divided between the complainant and him, by their

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agreement set forth of May 4th, 1841, amounting to \$1939.50, leaving in this defendant's hands a balance of \$5815.66; and, second, the following amounts, included in said inventory, which have not been collected, and which, after diligent effort for that purpose, he believes cannot be collected, to wit, (giving names and sums amounting to \$345.79,) leaving in his hands \$5469.87.

And he admits that, since the making of said inventory, he has collected and received, of the assets of the firm not included in the inventory, and which, he says, are all that he has thus received, or knows of as belonging to the firm, to wit, (giving names and sums, amounting, together, to \$117.33,) which added to the above, makes, in his hands, \$5587.20.

That he has set forth, in Schedule 1, annexed to this answer, a true and perfect account of all the moneys he has disbursed in paying the debts due from the firm, and in endeavoring to settle the affairs of the firm, amounting to \$4798.80, leaving in his hands, to be divided, between the complainant and him, \$788.40.

That the claims above specified as not being collectible, and all others belonging to the firm, as far as he knows, are worthless; and that, before the commencement of this suit, he offered to transfer to the complainant all the said claims, for the complainant's own use and benefit, to be collected by him, if they could be, without responsibility to this defendant for any part thereof, but the complainant refused the offer, saying that the matters should be settled according to law.

He denies that he ever refused to exhibit to the complainant either the books, papers and vouchers of the said firm, or a full and faithful account thereof, or to come to and have a fair and final settlement of their accounts, except on a single occasion, some time before the commencement of this suit, this defendant took from the post office, at about the hour of one o'clock in the day, a letter from the complainant, notifying this defendant that the complainant would call on him, at the hour of two o'clock of the said day, to have a settlement with him, at which appointed time this defendant was under a positive engagement to be elsewhere, and did not attend for that purpose. But shortly after, when this defendant had leisure, he called on the complain-

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ant and offered and requested of him to come to a final settlement of their affairs, which he positively refused to do, saying that he had called on this defendant once, and would not trouble himself to do so again, but declared that the law should settle the matters for them.

He further saith that he has frequently and in a friendly manner, applied to the complainant, since their final separation, and requested him to come to a settlement of their affairs. And he further states, that after said separation, to wit, on the 17th September, 1841, and when the affairs of the said firm were in the same situation as at present, except that since that time the defendant has collected the sum of and has paid out the sum of , at the request of this defendant, and through the intervention of Peter P. Runyon, the complainant was persuaded to come to a settlement with the defendant. On which day last aforesaid, the complainant, in the presence of the said Peter P. Runyon, had exhibited to him all the books, papers, vouchers, receipts, notes, and other evidences of claims belonging to the said firm which were desired by the complainant, and within the custody and power of this defendant. All of which were then and there examined and inspected by the complainant to his entire satisfaction, as he declared at the time, and all errors, so far as any had been discovered, were corrected.

And he further states, that at such inspection and examination of the books, &c., as aforesaid, the said complainant expressed himself satisfied, and fixed the amount himself which he alleged was due from the defendant to him, at the sum of \$378.69; \$43 of which amount he, the said complainant, then and there admitted that he had previously received from debtors of the said firm on accounts with which this defendant stands charged in the said inventory. And the balance of the said amount was, on the said day of settlement, paid and satisfied to the said complainant by this defendant, amounting to the sum of \$335.69, and for which amount the complainant then and there gave this defendant a receipt in writing, which is now in the custody of this defendant, and ready to be produced.

He further saith, that at the time of said settlement, when he allowed, paid and satisfied to the complainant, the said sum of

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\$378.69, as above stated, he, this defendant, was satisfied that the said amount was considerably more than the said complainant was then entitled to, or ever would be, out of the assets of the said firm, and that he so told the said complainant; but for the sake of peace, for the purpose of ending difficulty between them, to avoid law suits, and that the complainant might be fully satisfied that entire justice had been done towards him, this defendant yielded to what he then and now considers an unjust demand, and paid him the money.

He admits that he still retains in his possession the books of the said firm, and he humbly submits to this honorable court that he has a right so to do by the terms of the said deed of dissolution; but he denies that he has ever refused to let the complainant see or examine said books, or to correct any errors contained therein.

And he further admits that he has since the date of the said receipt, when the said sum of \$355.69 was paid by the defendant to the complainant, refused to pay to the complainant any more money, for the reason that he had already paid him more than he was entitled to have out of the assets of the said firm; but he expressly denies that he has ever refused to come to a full and final settlement of their accounts.

He admits that after the dissolution of the said firm, and after the said books and assets had been passed to this defendant as aforesaid, the said complainant did offer to take into his hands the books, notes, and the other assets of the said firm, and to collect and liquidate and pay the debts due to and from the said firm, without any charge on his part against the said firm for such service. And that the defendant declined such offer; first, because the complainant was at the time considered wholly irresponsible and unsafe, in a pecuniary point of view, not being the owner of property but to a very limited extent. Secondly, because the complainant was indebted to the firm in the sum of \$3300, or thereabouts. Thirdly, because the complainant was indebted on his individual account to divers individuals, to a large amount, some of which claims were at the time pressing hard upon him. Fourthly, because the assets of said firm amounted to the nominal value of \$7872, or thereabouts, which amount,

under the circumstances of the case, the defendant believed would be placed in great hazard by being confided to the hands of the complainant. Fifthly, because the firm was indebted to the amount of nearly five thousand dollars, for which this defendant was held responsible ; and it was thought doubtful whether the assets of the said firm would be sufficient to pay its debts. Under all these circumstances the defendant would have been unwilling that the said assets should have gone into the hands of the complainant on any terms.

But he denies that he ever offered or agreed to take upon himself the responsibility and burthen of collecting the claims, paying the debts, and doing all other things necessary to the entire liquidation and final settlement of the business and affairs of the said firm without any compensation ; but, on the contrary, he saith that the collection of the said claims, and the payment of the said debts, the keeping of the accounts, and the performing of all other duties consequent thereon, imposed upon him a large amount of labor, responsibility and loss of time, for which he submits he is entitled to a just, fair and reasonable compensation out of the property and assets of the said firm.

And he further denies that he ever promised or agreed to hand or deliver over to the complainant the books, &c., of the said firm, as the continuing partner of the said firm.

And he denies that, upon a fair balance of all accounts relating to the matters aforesaid, he is indebted to the complainant in a large sum of money, or any other sum. But he expressly saith that after charging him, this defendant, with all the moneys of the said firm which he has collected, or could have collected, since the said final separation, and after allowing him for all the debts and other expenses which he has fairly and honestly paid out in behalf of the said firm during said time, and after allowing to him the sum of \$387.69, paid the complainant as before stated, and after allowing to him out of said assets a just and reasonable compensation for his labor and services in liquidating and settling the business and affairs of the said firm, and after charging the complainant with \$27.50 which he received of John Chadwick, of Newark, which belonged to this defendant, but which this defendant saith the complainant received, but has not

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paid to the defendant, there is due to this defendant from the complainant a large amount of money, which he, this defendant, prays may be decreed to be paid to him, the defendant, by the complainant.

He admits that the said account furnished the complainant by the defendant, as mentioned in the bill of complaint, was hastily made out and was not very precise as regards dates, persons, &c., for the reason that the complainant was supposed to understand them as well as the defendant, he, the complainant, having made out the said inventory at his leisure, and having also before that time seen and inspected the receipts and vouchers of the defendant at the time of settlement and giving the receipt of \$335.69 before mentioned ; but that the amounts of debt and credit as contained in said account, so far as this defendant now recollects the same, were correct, or nearly so.

By consent of the parties, an order was made, April 6th, 1843, referring it to Joseph F. Randolph, esquire, one of the masters of this court, to take an account of the aforesaid moneys and assets come to the hands of the defendant, or which might have been, but for his willful neglect, received by him, and for all other moneys and assets of the said firm for which the said defendant should be made accountable, and which are in the said bill of complaint and agreement specified ; the parties to produce before the said master, upon oath or affirmation, all deeds, books, papers and writings in their custody or power relating thereto, and be examined as the said master shall direct. And all further equity and directions were reserved till the coming in of said master's report.

The books were produced before the master, by the defendant, under oath.

Jonathan C. Ackerman, Esq., sworn for complainant, saith that, on complaint to witness of Mr. Hutchinson that he could not get a settlement with defendant, witness spoke to Judge Runyon, the father-in-law of defendant, to endeavor to bring about a settlement ; this was in the summer after the dissolution ; complainant frequently complained to him ; before then he said he had received about \$300 in part of his claims.

Being cross-examined, says he did not speak to the defendant

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on the subject, but went to his father-in-law, Judge Runyon, knowing that he was acquainted with their business prior to the dissolution; complainant alleged that defendant owed him, and showed a list of notes that he had, a part of which complainant claimed as his; the reason why witness did not go at once to defendant was, that there was not then a very friendly feeling existing between them; after the dissolution of the parties, witness and two other persons advanced some money, to enable complainant to go on with the business in a kind of limited partnership.

Peter P. Runyon, Esq., sworn on the part of the defendant, says he is acquainted with the parties, and recollects the time when the partnership commenced; witness had a general knowledge of their business, not a particular one; as to the capital of the concern, Mr. Hutchinson obtained from witness about \$300, which was, by note, increased to \$700, and Mr. Onderdonk advanced \$1000; this money and their credit constituted their capital; except the \$700, the balance of the capital came through defendant and his friends; witness was his father-in-law, and endorsed for him or the firm; witness advanced for the firm, in various ways, so that on the 15th of June, 1837, they gave him a bond and warrant of attorney for \$4064.88; this was for money advanced by witness independent of endorsements on business paper then outstanding, amounting to about \$3000; he believes the complainant was indebted to the firm, at the time of the dissolution, and for some time before, in about \$3000; the defendant, for some time before the dissolution, sought to have a dissolution; it took place when it did, at his instance; complainant preferred not to dissolve, but did not object; the first dissolution was intended to bring about a final settlement of the whole concern, and, for that purpose, complainant remained and attended to the affairs, all of which were under the control of the defendant; after the final separation, defendant paid witness between \$3300 and \$2400; this money was due him from the firm, and paid by defendant. This last objected to by Mr. Wood.

From December, 1840, up to about the 1st of June, 1841, defendant was engaged in settling up the concerns of the firm, and in no other business that witness knows of, except in preparing to go into business on the water-power. During that time, he

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was frequently away from home, and, as witness understood, on the business of the firm ; understood that several of the debtors resided out of the state—at Washington, Baltimore, Philadelphia, New York, and the East ; witness supposes that it was necessary, in settling up the firm business, to be considerably from home on expenses ; it was, during the time, very difficult to collect money ; taking into consideration the situation of the affairs of the concern, and the condition of the monetary affairs of the country at the time, from witness' knowledge of the whole matter, he would have charged five per cent. for settling up the affairs of the firm ; he thinks that a fair compensation from and after the final separation ; some time after September, 1841, complainant asked witness if he had said defendant should have commissions ; witness does not remember his answer ; it was not definite, however ; complainant said he had offered to do it for nothing ; this he stated as a reason why defendant should have nothing ; previous to September, 1841, complainant called on witness, and said he wanted defendant to settle with him ; witness said that was right and reasonable, and he would do what he could to effect it ; witness had told complainant, previous to the final dissolution, that he would do what he could to effect a settlement ; witness, accordingly, called on the defendant, and, in consequence thereof, the time and place for a meeting of the parties were arranged ; this took place, the witness and both parties being present ; September 17th, 1841, was the time, as witness believes ; after a good deal of conversation, and going over their whole matters, a balance was ascertained to be due the complainant, and this balance was paid by the defendant ; complainant said he would be satisfied with this amount ; defendant at first objected, but finally agreed, and gave it to him ; thinks defendant paid all complainant demanded, by a check or otherwise ; it was in the neighborhood of \$400 ; this settlement, witness understood, embraced all matters, except two or three small affairs, amounting to about \$100, to be settled in future, of which \$70 was in a note ; all other matters were settled, except there were errors ; there were some small matters in which the parties disagreed as to whether they belonged to the firm or not ; witness says he cannot say whether they were settled or not ; these

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items were, a charge against John Onderdonk for \$17.99, and for cash charged \$13.45. After the settlement, defendant complained very much of it, and found fault with witness; he made no resistance to a settlement. Witness says the signature to the receipt marked Exhibit No. 1 for defendant, is in complainant's handwriting, and is the receipt given on the settlement before stated. Mr. Reamer had a judgment against complainant for between \$400 and \$500; he asked witness to endorse notes to enable him to pay it, which witness declined; the judgment was in Middlesex; complainant lived in Somerset; he may have moved over shortly after the judgment; the \$3300 or \$3400 paid to witness by defendant was in small payments of a few hundred dollars at a time, except the last, which was for \$1600. Witness states that a paper shown him is in his handwriting, and contains an account between himself and the firm, and the payments by the defendant; it was made out at the date of the receipt; it is offered in evidence, and marked Exhibit No. 5 for the defendant.

Being cross-examined, witness says that when the partnership commenced, the complainant was carrying on the business in New Brunswick; he had previously commenced it; it was an experiment not yet established; defendant then first entered into business; defendant furnished no capital, as witness knows, except what he got from witness and his father; whatever witness advanced was accounted for by the firm; to them witness looked for pay; it may be considered a loan; cannot say the amount, or the terms; impression is he advanced \$1000; witness was only to be liable for what he endorsed and the money advanced, not for their debts or losses; no other partners but Hutchinson & Onderdonk; witness expected some remuneration for his risk, independent of the interest, if the experiment was successful; there was no distinct bargain about it; it was cheerfully awarded. Speaking of the indebtedness to the firm of the complainant, witness refers to the first dissolution; the firm had an account against defendant also; does not know the amount; after the bond and warrant of attorney was given, an account of the money affairs between witness and the firm was kept separately from that of the bank; witness loaned them money, and they paid him from

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time to time ; at the meeting of Sept. 21st, 1841, the parties were together an hour, or an hour and a half ; witness did not go over the accounts with them ; since that time complainant has called on witness and said that he wanted a settlement ; this was some time before this suit was brought—a month or two ; he complained that defendant would not settle, and defendant said that he (defendant) did not owe him anything ; Mr. Wood called on witness since, and said, let defendant render an account, and a settlement might be effected ; this was after the suit was brought ; witness did not understand Mr. Wood that he was then authorized to settle ; has heard complainant say that he wished defendant would take the books and make out an account, or let Thompson do it ; this was previous to the first settlement ; understood that the parties to this suit were general partners, and each liable as such, both before and since the dissolution ; each to share equally in the profits and losses, according to the rules of law applicable to general partnerships ; witness is not certain that the thirty-three or four hundred dollars embraces all the moneys paid him by defendant ; witness incurred the liabilities for the firm, on account of his son-in-law ; he would not have done it otherwise.

Being again examined-in-chief, witness says that when the complainant called on him, and said he wanted a settlement from defendant, he said nothing of any errors or mistakes in the former settlement or account ; he did not allude to it ; he said he intended to prosecute, and he let him (witness) know first about it ; the \$500 paid witness for his risk, was by the agreement of both parties.

Being again cross-examined, he says that at first there was no specific sum agreed on for his risk ; the \$500 was agreed on some time during the progress of the dissolution ; witness proposed to take a portion of the profits, or a specific sum, and complainant said it had better be a specific sum, and then witness proposed this amount, and it was agreed to ; nothing said about conditions ; thinks both were present, and that it was in the shop, and before the final separation ; they agreed to it cheerfully, particularly the complainant.

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EXHIBIT NO. 1.

Received, New Brunswick, September 17th, 1841, of Peter C. Onderdonk, three hundred and thirty-five 50-100 dollars, in full of all demands, dues, and debts, accruing to me out of the late firm of Hutchinson & Onderdonk, as far as they have been paid, errors excepted.

\$335.50-100.

HIRAM HUTCHINSON.

EXHIBIT NO. 5.

*Hutchinson & Onderdonk,**To Peter P. Runyon, Dr.*

June 15th, 1837.	To Bond	\$4,064 88
	Interest to May 1st, 1841.....	1,030 60
March 1st, 1840,	Amount of book account, including	
	interest, as per bill.....	1,781 31
	Interest to May 1st, 1841.....	124 67
July 1st, 1840.	His share of the profits.....	500 00
	Interest to May 1st, 1841.....	25 00
	Johnson's account, rent and interest	8 40
		<u>\$7,534 86</u>

1840.

Cr.

March 1st.	By book account, including interest to	
	that time, as per bill....	\$3,785 92
	Interest to May 1st, 1841,	272 74
	Cash paid in N. York.....	36 00
	Interest to May 1st, 1841,	2 88
		<u>\$4,207 54</u>

\$3,327 32

Jan'y 18th, 1841.	By cash paid P. C. O.....	\$310 00
	Interest to May 1st.....	5 27
March 1st.	By cash.....	300 00
	Interest to May 1st.....	3 00
March 11th.	By cash.....	50 00
	Interest.....	41
April 21st.	By cash.....	100 00

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	Interest	\$0 16
March 3d.	By cash	30 00
	Interest	28
April 26th.	By cash	400 00
May 7th.	By cash	500 00
		<hr/>
		\$1,699 12
		<hr/>
	Balance due P. P. Runyon, May 1st, 1841....	\$1,628 20
	Interest to June 1st, 1841.....	8 14
		<hr/>
		\$1,636 34
Received, June 1st, of Peter C. Onderdonk, the above in full.		
PETER P. RUNYON.		

On the 31st of May, 1843, the master reported as follows: I find that the defendant, subsequent to the dissolution of the partnership, received of the debts and effects due and belonging to the late firm, \$5603.13, as appears by Schedule No. 1, annexed; that this sum embraces all the moneys and effects of the said partnership, which came to the hands of the defendant, or might have been received, but for his willful neglect, and also all moneys and effects of the said firm, for which the said defendant should be made accountable. That the said Schedule No. 1 embraces a list of all the accounts and notes specified in the bill, answer and schedule thereto annexed, in the charge filed with the master, and in Exhibit D on the part of the complainant, being a receipt of the defendant for the amount of the notes of the firm taken by him to collect, and also of the moneys of the firm not specified in said schedules, and receipts that have been collected by the defendant, as admitted by him or proved by the evidence, except such notes as were divided by the mutual agreement of the parties, and such accounts as were taken by the complainant to be collected at his risk, without accounting for the same to the defendant, as agreed upon by the parties before the master, as will more fully appear in the evidence hereto annexed.

That the defendant filed with the master his discharge, hereto annexed, and that I find that the defendant has paid out of the moneys received by him belonging to the said firm for debts due

by the firm, and other just allowances, the sum of \$4640.69, as will more fully appear by Schedule No. 2, hereto annexed, which embraces all the items contained in the schedule annexed to the defendant's answer, and claimed by him as discharges, except the following items, (stating several small items.) In the settlement of the account of Peter P. Runyon, Esq., much difficulty has arisen from the different modes of calculating the interest. The account, as made out by Judge Runyon, appears to have been based upon a statement made by the complainant, in which the account is made out in the mercantile method, by calculating interest on the several items of debt, and crediting it up to the time of settlement. Although this method of computing interest is objectionable, and on a simple bond or note with the interest paid annually at seven per cent., the payments and the interest thereon would more than exhaust the entire debt in twenty years, (*Hoffman's Master* 360,) yet inasmuch as the parties have sanctioned that mode of calculation, under the authority of *Stoughton v. Lynch*, 2 *Johns. C. R.* 213, it might be recognized in this case; but Judge Runyon had a bond running on interest against the firm at the same time with the account, and to prevent the benefit to him of the annual payment of interest, while the account of the firm was drawing interest, he calculated compound interest on the bond, thereby charging \$85.50 more than the simple interest on the bond. As the master was not aware of any principle by which this could be allowed, it is rejected. The defendant has exhibited a statement and calculation hereto annexed, as Schedule No. 3, by which the difficulty is said to be in a great measure overcome. As this calculation is not agreed to by the complainant, nor sanctioned by any adjudicated authority, and is moreover composed in part of compound interest on the one side, while no interest is reckoned on the other side, the whole calculation and result has been rejected; but is herewith reported that the defendant may have the benefit thereof before the Chancellor. To obviate the difficulties as far as possible in this account, the master has deemed it advisable to re-calculate the whole amount upon the principle laid down in *Meredith v. Banks*, 1 *Halst.* 408, by applying the payments in the first place to pay off the interest, and then to liquidate the principal; and there

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being a running account on each side, as well as a bond due from the firm to P. P. Runyon, the accounts are in the first place taken to balance each other without interest, and the overplus taken to pay off—first, the interest, and then the principal of the bond, making rests wherever the overplus of payments exceeds the interest due on the bond. This method is pursued until the 11th of July, 1839, when the credits in the accounts exceed the payments, and the interest is calculated from that time on the balance remaining due on the bond, also on the balance of the account from the close, and also on the sum of \$500 from the time it was agreed to be paid up to the time when the payments by the defendant exceeded the entire interest, viz., January 1st, 1841; and the usual method of deducting the payments and calculating interest on the balance is then pursued, until the whole claim is finally liquidated, as will more fully appear by Schedule No. 4, hereto annexed, as part of this report. This method lessens the amount of the claim of P. P. Runyon, \$38.79, and changes the final payment from \$1545.46 to \$1505.67.

The payment of \$500 is allowed as a compensation to Judge Runyon for his risks in endorsing for the firm and supporting it through difficulties upon the agreement of the parties as proved. Judge Runyon might no doubt have at the time appropriated any of the payments to the interest at the time due on bond, instead of suffering them to be entered in the account current, and so might the firm have done. 1 *Pick. Rep.* 332; 7 *Wheaton* 332; 9 *Cow.* 409; 8 *Wend.* 403, &c., &c. But where both omit to make such appropriation at the time, it is the duty of the court so to appropriate them as to do justice to the parties as far as possible, without violating any settled principle.

The defendant claims a commission of five per cent., which is not allowed by the master. The evidence goes to show that the defendant was engaged in settling up the business of the firm about six months, and has a fair claim for compensation, if the rules of law permitted compensation to one party of a firm for extra services, without an express agreement; but as the principle against such allowance seems well settled, (1 *Vesey & Beam* 168; 1 *J. C. R.* 157; 3 *P. Wms.* 249,) the claim is rejected; though the attention of the master was called to the case of

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Bradford v. Kimberly, 3 J. C. R. 431, to prove an exception to the rule, which the case itself fully recognizes ; and the exception, if one it be, is this, that, when the joint owners of a vessel appoint one of themselves to receive and sell the cargo, he is to be considered in the light of a "stranger," as a "commission merchant," and entitled to remuneration upon the implied agreement ; this is not a case of general partners, where one of them has settled up the concerns or done other extra service, but of joint owners, engaging one of themselves to act as a commission merchant for the owners, being, in fact, a distinct business from that of the joint parties ; besides, in this case, so far from there being an agreement, express or implied, the defendant, by his deed of dissolution of the 18th of June, 1840, agrees to pay over to the complainant the one-half of the surplus arising from the debts and credits of the concern, without making any reservation for commissions or other remuneration.

Taking into account the charges and discharges of the defendant, as heretofore stated, the balance due the firm on 17th of September, 1841, when a partial settlement was effected, I find to be \$962.44, as follows :

Amount of charges.....	\$5,603 13
Amount of discharges.....	4,640 69

Balance.....	\$962 44
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The one-half of this was due to the complainant, of which sum I find by the evidence the sum of \$378.69 was paid to him on the 17th of September, 1841, leaving the amount to stand thus :

One-half of the balance.....	\$481 22
Paid, Sept. 17th, 1841.....	378 69

Leaving a balance of.....	\$102 53
Interest thereon from the 17th of Sept., 1841, to the 31st of May, 1843.....	10 48

Total due this day.....	\$113 01
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No other interest is charged against the defendant, because the business appears to have been fairly and expeditiously set-

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tled, and the money was paid out as soon as received, or within a reasonable time after.

JOSEPH F. RANDOLPH, *M. C. C.*

The complainant and defendant, by their respective solicitors, filed exceptions to the foregoing report.

Among the exceptions taken by the complainant, are—

1st. For that the said master hath given credit to the defendant for \$378.69 paid to complainant: whereas credit should have been given for \$335.69 only, as is shown by defendant's vouchers and his answer.

2d. For that the said master hath allowed to the defendant a credit for \$500 and \$15 interest, alleged to have been paid by him to Peter P. Runyon.

One of the exceptions on the part of the defendant was, that the master made no allowance to him by way of compensation for his services in settling the business of the firm.

P. D. Vroom, for the complainant.

J. Vandyke, for the defendant. He cites 3 *John. Ch.* 431.

THE CHANCELLOR. There is nothing said in the deed of dissolution about allowing Mr. Runyon \$500, either as a share in the profits, or for his risks in endorsing for the firm. By the terms of the deed of dissolution, the defendant was to collect the claims and pay the debts, and pay over to the complainant half the surplus. This \$500 now claimed by Mr. Runyon, and allowed him by the master for his risks in endorsing for the firm, was certainly not a debt.

Again, on the final separation, the defendant, as he admits in his answer, was still to collect, and pay the debts, and pay over to the complainant half the surplus. In this part of the answer he says he was to pay over after making proper deductions and payments.

There is nothing said in the answer about this \$500 to be allowed to Mr. Runyon. The general words, "after making proper deductions and payments," and an item in the schedule annexed

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to the answer, of the date of May 1st, 1841, "Paid P. P. Runyon on his account \$500," are the only matters in the answer that can have any reference to this \$500 allowed to Mr. Runyon for his risks.

The receipt given by the complainant, on the 17th of December, 1841, is not relied on as proof of final settlement and discharge, for the parties have agreed to go into the account, and it was agreed that a reference should be made to a master to state the accounts.

This allowance to Mr. Runyon, if made, must be made on the sole ground of what Mr. Runyon himself says about it. He was called by the defendant. Nothing is said about it in his principal examination. On cross-examination, he says he expected some remuneration for his risks, independent of his interest money, if the experiment was successful; that there was no distinct bargain about it—it was cheerfully awarded.

Being again examined on the part of the defendant, he says the \$500 paid him for his risk was by the agreement of both parties.

Being again cross-examined, he says that at first there was no specific sum agreed on for his risk; the \$500 was agreed on some time during the progress of the dissolution. That he proposed to take a portion of the profits or a specific sum; that the complainant said it had better be a specific sum, and he, the witness, proposed this amount, and it was agreed to; that nothing was said about conditions. He thinks both were present, and that it was in the shop before the final separation; that they agreed to it cheerfully, particularly the complainant.

It may be remarked here, that the final separation was in December, 1840; and that to Exhibit No. 5, Mr. Runyon's account against the firm, is subscribed Mr. Runyon's receipt in full to Onderdonk, dated June 1st, 1841; and that this exhibit shows under date of July 1st, 1840, this charge, "His share of the profits, \$500."

Has this \$500 been actually paid by the defendant to Mr. Runyon? If I could be satisfied that it had been, by agreement of the parties, so paid by the defendant that to disallow it would result in loss to him, I would leave the parties *in statu quo*; but.

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I am not satisfied that anything more has been done, between Mr. Runyon and the defendant, in reference to this \$500, than the stating the accounts between them in a way to relieve the defendant to that extent in his accounts with the complainant. If paid, when was it paid? No one tells us. Nor is there any direct allegation that it has ever been paid. Mr. Runyon says that, besides the bond and warrant for \$4064.84, he had endorsed for the firm to about \$3000; and, in another part of his deposition, he says that, after the final separation, the defendant had paid him between \$3300 and \$3400, due him from the firm. Is this \$500 included in the language "due him from the firm?" Was it a debt? In another part, he says the \$3300 or \$3400 paid him by the defendant was in small sums of a few hundred dollars at a time, except the last, which was \$1600. There is an evident tenderness in reference to the matter of the actual payment of this \$500. But, under the circumstances of the case, and in view of the relation existing between Mr. Runyon and the defendant, and the remark of Mr. Runyon that he would not have done what he did, had not one of the firm been his son-in-law, I do not think I should have been satisfied to allow this charge, even if there had been evidence of a formal payment of it by his son-in-law.

The master does not put the allowance on the ground that it had been paid. He allowed it "as a compensation to Mr. Runyon for his risk in endorsing for the firm and supporting it through difficulties, upon the agreement of the parties as proved." I think it is an agreement which, if clearly proved, the court should not aid in carrying out. It is the first occasion on which I have heard it claimed that one is to be allowed, by a court, compensation for endorsing for another. If he had advanced the money, instead of endorsing notes, he could have but legal interest. To my mind, the sanction of such a charge would furnish a cover for exorbitant charges, in effect usury, and that not on money advanced, but on mere liabilities incurred. It would be a mischievous precedent to allow such a charge. This exception of the complainant is therefore allowed.

Next, as to the other exception on the part of the complainant.

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The master has charged the defendant with the amount received by him	\$5,603 13
And credited him with amount paid by him	4,640 69
And has struck the balance here of	962 43
The report then divides this balance and says one-half of it is due complainant	481 22
And then says that it appears by the evidence that on the 17th Sept., 1841, \$378.69 was paid by the defendant to the complainant, and deducts it..	378 69

And strikes a balance against the defendant of..... \$102 53

The answer says, that on the 17th September, 1841, the defendant paid to the complainant \$335.69, and that the complainant admitted he had received \$43 from debtors of the firm, on accounts with which the defendant stood charged in the inventory, which \$43, added to the sum actually paid, made \$378.69.

It does not appear that in the master's charging side of the account, the defendant is charged with the accounts from which the \$43 was collected by the complainant; but, if I understand it, the defendant is charged by the master only with the moneys actually received by him. The master says that he finds that the defendant received, subsequent to the dissolution, of the funds and effects due and belonging to the firm, \$5603.13, as appears by Schedule No. 1, annexed to his report; that the said sum embraces all the moneys and effects of the partnership which came to the hands of the defendant, and all the moneys and effects of the firm for which he should be made accountable; that Schedule No. 1, annexed to his report, embraces, &c., (see the first part of the report.) Now, Schedule A, annexed to the bill as an account of the assets of the firm at the time of the dissolution, amounts to \$8147.41; and Schedule B annexed to the bill as an account of the moneys received by the defendant from the assets, amounts to but \$5589.91. I do not see from this that the \$43 was received by the complainant from accounts with which the defendant remains charged.

The answer gives a list of names, with the amount due from each, which the defendant says he was not able to collect, and

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he takes credit for them, and then says :

“ Leaving in the hands of the defendant claims which have been collected, to the amount of..... \$5,469 87.”

He then admits that since the making of the inventory, he has collected and received the following items not included in the inventory, (giving names and sums,) amounting to \$117.33. And then adds, “ which, added to the amount *in the hands* of the defendant as last above stated, makes the sum of \$5587.20,” which sum, it will be perceived, is within \$2.71 of the amount of said Schedule B, annexed to the bill as an account of the moneys received by the defendant. It seems from this that the defendant has only charged himself with the moneys actually received by him, and why should he charge himself with more ?

The master has charged him with but \$5603.13, being but \$16.93 more than the defendant has charged himself with having actually received. What this additional \$16.93 is for, would, I presume, be discovered by a particular examination of the report, but this is not necessary ; it is not the \$43 received by the complainant. And I do not see that the defendant, as the account is stated by the master, is charged with the accounts from which the complainant received the \$43. If it can be shown that he is, there can be no objection to his doing so.

To make the account correct, in the master’s mode of stating it, one of two ways may be taken : either to add the \$43 to the whole amount of receipts, which will show the amount to be divided between them, and let the \$43 go towards the complainant’s half, as already received by him, or, to deduct from the balance, \$481.22, struck by the master, the \$335.69, and half of the \$43.

This exception on the part of the complainant is also allowed.

The exception on the part of the defendant, that the master has made no allowance to him by way of compensation for his services in settling the business of the firm, is, I think, well taken. I shall direct the allowance of 3 per cent. on \$5603.13, and that he be credited therefor, and that the balance in his hands be then struck, which will be the same as deducting half of the commissions from the complainant’s half of the balance struck.

REVERSED, 2 Hal. Ch. 632.

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PLINY B. FULLER v. CHARLES TAYLOR.

1. Injunction allowed, and receiver appointed, on bill by an execution creditor.

2. An answer of a defendant, to a bill for discovery, &c., by an execution creditor, that he has no property of any kind, will not prevent an order referring it to a master to appoint a receiver, and directing the defendant to deliver to such receiver his property and effects, on oath before the master.

Bill filed March 20th, 1847, by Pliny B. Fuller against Charles Taylor, after judgment at law and execution thereon returned unsatisfied, to compel the discovery of any property belonging to said Taylor, and to prevent the transfer of any such property; or the payment or delivery thereof to the said Taylor, and praying injunction and a receiver.

On the reading and filing of the bill, an injunction was granted.

On the 7th June, 1847, a motion was made, on notice, for an order that it be referred to a master to appoint a receiver, and that the defendant deliver over to such receiver his property and effects, on oath before the master.

On the hearing of the motion, an answer of the defendant to the bill, was read.

Wm. M. Scudder, for the motion, read the statute approved March 20th, 1845, entitled "A supplement to an act respecting the Court of Chancery." *Rev. Stat.* 921. He said it was similar to the statute of New York, on the same subject, and cited 4 *Paige* 575; 7 *Ib.* 47; 8 *Ib.* 568, 572.

A. C. M. Pennington, *contra*, contended that a receiver should not be appointed, after answer denying all the charges of the bill—that a receiver should not be appointed unless the answer shows there is property assign.

THE CHANCELLOR. The supplement to the act respecting the Court of Chancery (*Rev. Stat.* 921) provides that, whenever an

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execution shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, leaving an amount or balance remaining due exceeding \$100, exclusive of costs, the party suing out such execution may file a bill in chancery to compel the discovery of any property or thing in action belonging to the defendant in such judgment, and of any property, money, or thing in action due to him, or held in trust for him, except such property as is now reserved by law, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor himself.

That the court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money, or things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery; provided, that if the personal property, money, or thing in action which shall be discovered as aforesaid, does not amount to \$100, no costs shall be recovered by the plaintiff in such proceeding.

This act was passed after the enactment of the law abolishing imprisonment for debt, and is founded on the just idea that all the property of a debtor should be honestly applied to the payment of his debts, and on the further idea that, in view of the frauds of debtors in concealing and withholding property from creditors, by putting it in such shape that it cannot be reached by execution at law, the execution creditor should have the aid of a Court of Chancery to discover property and apply it to the satisfaction of his execution.

The statute is founded in morals, and is of most salutary tendency, and the spirit and equity of it should be faithfully and rigidly carried out by the Court of Chancery. A proper exercise, by this court, of the power given to it by this statute, will tend to correct an alarming evil which, I am satisfied, was fast growing upon us, by removing the temptations to the practice of it. The dictates of morality, and even of religion, or, I should

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rather say, the profession of it, seemed insufficient to silence the many pleas under which an easy conscience rests satisfied in the concealment of property from creditors. A legislative provision, in the shape of power to compel the discovery of hidden property, under the sanction of an oath, was necessary to correct the evil.

The statute provides that the court shall have power to compel the discovery, and, there being no limitation of the power, the plain inference is that the statute gives all the power which a Court of Chancery can exercise according to the course of the court. And the evil to be remedied is of such a nature that this court will not hesitate to exercise its fullest power in applying the remedy.

These remarks are not made with special reference to the present case, but are intended to express the views of the court as to the power given by the statute, and the manner in which it may and should be exerted.

The question now presented is, whether an answer of a defendant, to a bill filed by an execution creditor under our statute, that he has no property of any kind, enables a defendant successfully to resist a motion for an order referring it to a master to appoint a receiver, and for the delivering over, by the defendant, to such receiver, of his property and effects, on oath before the master. I am clearly of opinion that it does not.

The order applied for will be granted.

Order accordingly.

Miller v. English.

HENRY MILLER AND OTHERS, TRUSTEES OF THE ANTI-PÆDO-BAPTIST SOCIETY MEETING IN SALEM, v. ISAAC ENGLISH AND OTHERS.

1. The question of property and right of possession, between two bodies, each claiming to be the trustees of an incorporated religious society, is a question to be determined at law.

2. A dissension having arisen in an incorporated religious society, growing out of the question whether a house of worship should be built at another place, a part of the congregation built the new house, and elected a board of trustees. A part of the congregation remained in the old building; and the persons claiming to be the trustees of the old society refused to the new party entrance into the old burying-ground for the purpose of burial, and the new party, on several occasions, broke open the gates of the old burying-ground, for the purpose of burying therein. On bill filed, an injunction was granted restraining such forcible entry. On answer and argument the court held that a forcible entry for such purpose was not such an injury as called for the interposition of the court by injunction.

3. On motion to dissolve an injunction, affidavits in support of the injunction, to contradict matters in the answer alleged to be irresponsive to the bill, cannot be read if the defendant's counsel disclaim and waive reliance on any irresponsive matter.

The bill filed May 17th, 1847, is exhibited by Henry Miller, William Brown, William H. Nelson, Mark Armstrong, William Robinson, George O. Mitchell and Adam H. Sickles, of the county of Salem, trustees of the Anti-Pædo-Baptist Society meeting in the town of Salem, in the State of New Jersey.

It states that, in 1743, the first Baptist meeting-house near Salem was built at a place called "Mill Hollow," and that, in 1757, it was constituted as a church.

That the congregation having greatly increased, a new and large house became desirable and necessary, and a large and commodious brick building was erected in the town of Salem, in 1787; and the society continued an established and constituted religious society, by the name of "The First Day Baptist Society in the town and county of Salem, in the State of New Jersey," until July 3d, 1786, when the said society resolved to be constituted a body politic and corporate, under the act entitled "An act to incorporate certain persons as trustees in every religious society or congregation in this state, for transacting the

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temporal concerns thereof," passed March 16th, 1786; and did, accordingly, become so incorporated, under the name of "The Trustees of the Anti-Pædo-Baptist Society, meeting in the town of Salem, in the State of New Jersey;" and elected John Holme, Thomas Sayre, Benjamin Holme, John Briggs, Samuel Vance, Anthony Keasbey and Howell Smith the trustees of said body corporate.

That Mary Dunlap, by her will dated August 23d, 1790, devised to the trustees of the said society and their successors in office, all her lands in the town of Salem or elsewhere, forever, for the sole use and benefit of the said church, for the support of the gospel, and ministers or pastors to supply the said church, that may or shall be of the same faith and order that the said church was and now is established on; and authorized the trustees for the time being, whenever they, with the said church, should think it may be the most advantage to and for the support of a minister for the said church, to sell the said lands, or any of them, or to exchange them for other lands. That she also bequeathed the residue of her personal property, not otherwise bequeathed, to the said trustees for the same use and objects.

That the said society continued in apparent peace and harmony until a few years ago, when dissensions crept in among them, growing out of a proposition to erect a more modern and costly church edifice in a more central part of the town of Salem.

That frequent meetings were held on the subject, at which much disagreement and acrimony appeared.

That all the complainants, (except William Robinson, who lived out of the town of Salem,) and many in the vicinity of the said town, opposed the building of a new church edifice, and the expenditure for that purpose of the funds of the society, devised to them for other purposes.

That, as far back as May, 1840, it was suggested, by some or one of the persons who advocated the building of a new church edifice, that no record of the certificate of the first trustees, nor of their oaths of office, could be found in the office of the clerk of the county of Salem, and that the original certificate signed by the said first trustees was lost. And, thereupon, it was re-

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solved that it was expedient to incorporate the said Baptist church and congregation, pursuant to the act entitled "An act to incorporate trustees of religious societies," passed June 12th, 1799; notwithstanding that the original corporation remained undissolved.

That in pursuance of said resolution, a meeting was held on the 5th of February, 1844, and a new incorporation formed, under the said act of June 12th, 1799, and Stephen Mulford, since deceased, John W. Challiss, William L. Seagrave, Henry Freas, William Johnson, Isaac English and John N. Cooper were elected trustees of said new corporation, who took and subscribed the oaths, &c.

That the said trustees thus last elected usurped the name of "The Trustees of the Anti-Pædo-Baptist Society, meeting in the town of Salem, in the State of New Jersey," and certified such name to the clerk of the county of Salem, who recorded the same, by reason of which proceedings, as the complainants are advised and believe, they abjured the former corporation, which is still in being.

That the said last-named trustees, having in their possession the funds, property, books and records of the original corporation, made sale of the said devised lands, in small lots, to several purchasers, and thereby raised about \$2000, and appropriated the same toward the erection of a large, new, costly building, for the said newly erected body corporate; which, the complainants are advised and believe, was illegal and contrary to the true intent and meaning of the will of the said Mary Dunlap.

The bill states that the meeting at which the question was put, whether the congregation should remove to the new edifice, was held without any notice given of the object or intent thereof, or consulting with the members opposed to the removal. That on the question being put, about sixty rose in favor of going to the new church; the members and congregation and persons attending the church being about 250. And it was determined, at one of the meetings, of which due notice was given, that the old church building should not be pulled down.

That the last-elected trustees, and such of the members of the said society or congregation as preferred the new body corporate,

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after the said meeting, and about December, 1846, separated and withdrew from the old church and from the original society or congregation, and went to the new building; and, having so removed and seceded, declared themselves to be the original, ancient corporation, and claimed all the property thereof, and use force and violence to enter upon the ancient property in possession of the complainants.

That a large number of the ancient society or congregation remained in their ancient house of worship, under their first original act of incorporation, of July 3d, 1786, never having seceded or separated themselves therefrom, or ceased to be members of the said ancient, original society and corporate body.

That the complainants, with the larger number connected with them, in order to perpetuate the line of succession under the said act of 1786, on the public notice required by law, assembled on the 16th of January, 1847, and elected six trustees, who, with William Robinson, who was a trustee and remained in the ancient society, are the complainants in this bill.

That the said trustees, after having taken the oaths prescribed by law, met, and elected Henry Miller president of the board of trustees, and opened a church book, and entered and continue to enter all their proceedings therein. And that they took upon themselves the charge and control of the lands remaining unsold of the said original corporation, and of the meeting-house premises and the burial ground adjoining the same. And that they gave notice to the defendants, and in two newspapers published in Salem, apprising those who wished to bury their dead in the old Baptist burying ground to make application to William Jarmon, the duly appointed sexton, which notice was signed by Henry Miller, president of the board of trustees.

That the defendants, and others who adhere to the new corporation, have, on several occasions, (stating them particularly) forcibly entered upon the said old burying ground, by breaking locks, &c., and dug graves therein, and threaten to continue to do so, and to force open the said old meeting house, and to raze it to the ground.

That on the 14th April, 1847, the complainants applied to the Supreme Court for leave to file an information in the nature of a

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quo warranto against the said Isaac English, &c., for usurping the office of trustee of the Ante-Pædo-Baptist Society meeting aforesaid, incorporated July 3d, 1786. And the said Supreme Court, on the 26th April, 1847, made an order or rule that the said defendants show cause, on the first day of the next term of said court, why an information in the nature of a *quo warranto*, at the relation of these complainants, should not be filed against the defendants herein named, by or in the name of the attorney-general, for usurping the office of trustees as aforesaid. But that the defendants, although served with the said order or rule, still persist in such forcible and violent entries as aforesaid.

That the complainants have frequently expostulated with the defendants, and requested them to desist from such force and violence, as the complainants would, freely, on proper request and application, let them enter and bury their dead, and preach funeral sermons, under the usual conditions of payment, &c. And requested that they would yield the quiet possession of said premises to the complainants, and deliver to the complainants the church book of record, or let them have access thereto, and all papers, deeds, writings and documents of or belonging to the said original body corporate, all which was refused.

The bill prays that the defendants may be decreed to account with the complainants, and to pay to them the amount of the sales made by the defendants of the real estate of said original corporation, and such other funds of said corporation as the defendants may have in their hands; and that the defendants may be restrained by injunction from entering upon the premises of the said original corporation in the charge of the complainants, without due application to, and leave granted by Henry Miller, president of the board of trustees, or the duly appointed sexton, and upon complying with the usual rules and payments in such cases for burying the dead; and from forcing any entrance into the said old church edifice, and from tearing down or in any way injuring the same.

On this bill an injunction was allowed by an injunction master.

The defendants filed their answer on the 25th of May, 1847. They admit that about the year 1675 there was a number of Baptist families in the vicinity of Salem, West New Jersey, and

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that in the year 1743 a Baptist meeting-house was erected at Mill Hollow, about two miles from Salem; that the society continued to increase, and required a larger place of worship, and that in the year 1787 a new brick edifice was erected by said society, in the upper end of the town of Salem; that the said Baptist society left the old building at Mill Hollow, and removed to the new building in Salem, and has continued from the year 1787 to the twelfth day of December, A. D. 1846, to worship therein, as a church and congregation, and that no one, as far as these defendants have ever known or heard, has ever charged their removal from their old house at Mill Hollow to their new house then erected in the upper end of Salem as an act of secession or breach of discipline, or contrary to church government.

And these defendants further admit, that on the third day of July, A. D. 1786, the said society was incorporated according to the then existing laws of the State of New Jersey, and became a corporate body by the name of "The Trustees of the Anti-Pædo-Baptist Society, meeting in the town of Salem, in the State of New Jersey," and that they did elect such trustees, who took the oaths of office and made such certificate to the clerk of the county of Salem, as the complainants have in their bill alleged; and that they also admit, that the said corporation has been since continued, and the succession of trustees hath been constantly kept up and perpetuated, and that the defendants, William Johnson, William K. Seagrave, John W. Challis, Henry Freas, and Isaac English, are the regular trustees of the said corporation; and that they now hold the full right and power to use, possess, and direct and control all the property of the said corporation, under the said act of 1786, and that the other defendants are either members of the said Baptist society, so incorporated in 1786, and therewith connected, or have acted under the direction of the said trustees in the several matters set forth in the said bill of complaint.

And these defendants further answering say, that the brick edifice in which the said Baptist society had worshipped from the year 1786, was situated in the upper end of the town of Salem, about three-quarters of a mile from the most densely populated part of the town, at an inconvenient distance for many of the

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members of the church and congregation, and had become much out of repair ; that in consequence thereof it became, in the judgment of most of the members of the society, a matter of great importance to their spiritual as well as temporal interests that a new edifice should be erected, of larger size and in a more suitable location ; that at a regular church meeting, held on the nineteenth day of March, A. D. 1842, a resolution was passed to hold a meeting of the church and congregation, on the second day of April ensuing, "to obtain the voice of the church in relation to building a new meeting-house in Salem." Regular notice of this meeting was given from the pulpit, according to the usages of the society, and at the meeting so held on the second day of April, A. D. 1842, at which at least one hundred and fifty persons attended, and Henry Miller, William Brown, and others of the complainants being present, resolutions were passed without a dissenting voice, "to give their aid to help raise funds to build a new meeting-house," and a committee was appointed to procure a suitable lot. Several meetings on the subject were subsequently held, and on the sixteenth day of August, A. D. 1842, at a meeting of the church and congregation, it was resolved, with a view to consult the opinions of all the congregation and ascertain clearly the desire of a majority, that a meeting should be called for the express purpose of considering and deciding "whether to remodel the old house, or build a new one." Due notice in the usual mode from the pulpit was given of this meeting, and the time fixed for September 22d, 1842. At such meeting, which was fully attended, a committee was appointed, consisting of those who were in favor of re-building and repairing the old house, and some who were friendly to a new building ; this committee met, and after a full interchange of views, they agreed upon a compromise, and made a report in which they say, "the committee appointed by the church to mature some plan for the mutual and harmonious action of this body, and also to give all a fair chance to carry out their views, either in new modeling or in building a new house, report in their opinion the best plan to preserve the peace and harmony of the church and congregation ;" which plan was in substance that an effort should first be made to raise funds to remodel and repair the old house, and if

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after nine months the estimated amount could not be raised, that then an effort should be made to raise the funds necessary to build a new house. On the 19th day of August, A. D. 1843, a period of more than sixteen months, at a meeting of the church and congregation, of which due notice had been given from the pulpit, according to the uniform usage of said society, the committee last appointed made a final report that sufficient funds could not be raised to re-model the old house, and "that they now give it up into the hands of those who are favorable to erecting a new house, for them to carry out the spirit of the resolution" passed at the meeting of April 2d, 1842. A new committee was then appointed to collect funds and obtain a lot, which was accordingly done; and on the twentieth day of October, A. D. 1843, the congregation, in pursuance with previous notice from the pulpit, met at their meeting-house, and there resolved, by a unanimous vote, to build a new meeting-house on the Firth or Thompson lot, and the trustees were ordered to take a deed for the same. On the sixteenth of March following, a building committee was appointed, who proceeded to the immediate erection of the new edifice. On the twentieth day of December, A. D. 1845, at a regular appointed church meeting, a resolution was passed, directing the trustees to use the funds of the church in their hands for the completion of the new meeting-house; and the yeas and nays being desired, were taken, when sixty-seven voted for the resolution, and eleven against it—the whole of the persons present having voted, with the exception of perhaps three to five.

And these defendants further answering, admit that there was some difference of opinion in the congregation in relation to the building of the said new house, but that such difference of opinion was slight, and did not, in any serious degree, affect the peace or harmony of the said church; and these defendants insist that no action or movement of the said trustees, church, or Baptist congregation, was ever had or attempted on the subject of building said new house, or any proceeding relating thereto, without previous notice, according to the well-known usage of such society, and thus affording to all its members full opportunity to be present and take part therein, if they desired to do so; and that, in every instance, when any business connected with the ques-

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tion of building a new house was to be transacted, a majority of the whole church and congregation attending the said meeting voted for and decided the different propositions, such as these defendants insist before this honorable court, and are ready to maintain and prove, being the fundamental principle of all Baptist societies in their church government, that a majority of the votes of those present shall always decide, and these defendants do expressly deny that any of the votes have ever been falsely or erroneously entered on the books or minutes of the said society, as the said complainants have improperly and falsely alleged.

And these defendants further answering say that, in obedience to the often-expressed wish of the said church and congregation, and pursuant to the orders and resolutions so passed at the said several meetings, the said William Johnson, John W. Challis, Henry Freas, William K. Seagrave, Stephen Mulford, since deceased, and Isaac English, trustees of the said Anti-Pædo-Baptist society, did, in conjunction with William Robinson, one of the complainants, proceed to the purchase of the said lot hereinbefore mentioned, and did erect thereon a large and convenient brick edifice, and finished and completed the same in a suitable manner for religious services, according to the ancient usages of the Baptist society in the United States, and that after the new edifice had been completed, and some time in the month of November of the year 1846, at a meeting of the said Baptist church, of which due notice from the pulpit, according to their ancient usage, had been previously given, held at their old meeting-house, a large number, to the amount, as these defendants believe, of over one hundred members, having been present, it was unanimously resolved that the new meeting-house should be dedicated to Almighty God on Saturday, the twelfth day of December, A. D. 1846; and also resolved that, from and after that day, the religious services of the said Anti-Pædo-Baptist Society should be held and conducted in the said new meeting-house, and these defendants expressly aver that due notice was previously given from the pulpit of the time of such meeting; and these defendants aver that there was not at such meeting any dissent or opposition to the proposition to remove the place of worship to the new house; and these defendants do aver that if the said William

Brown and his associates, as is alleged in the said bill of complaint, did feel or entertain any such opposition to the removal, that they did not express it audibly or let it be known to others; and these defendants aver that the said William Brown did, on that day, in such meeting, publicly declare "that he hoped no one would oppose the removal," and "that he should not oppose it;" and further these defendants aver that the said William Brown, one of the said complainants, did, about a week after said meeting, say to Samuel Lowe, one of these defendants, that he, the said William Brown, Henry Miller, another of complainants, and one Joel Simpkins, had determined to come down and attend at the new house; that they had consulted the Rev. Mr. Dodge, a venerable and highly-esteemed minister of said Baptist society, who had advised that course as proper to be pursued.

And these defendants further answering say, that on the 12th day of December, 1846, the said new edifice was dedicated to Almighty God, according to the ceremony, usage and practice of the Baptist church, and then became and now is the regular place of worship of the said Baptist society; and that, from that day, the worship of the said Baptist church has been regularly held and conducted on Sabbath day, and at such other times as are appointed, at the said new meeting-house; and that the said society has, since that day, only used the old meeting-house for funeral occasions; and they further say, that these defendants, part of whom, to wit, William Johnson, William K. Seagrave, Henry Freas, John W. Challis and Isaac English, are the regular "Trustees of the Anti-Pædo-Baptist Society, meeting in the town of Salem, in the State of New Jersey," and the residue of whom are members of or connected with the said society, have worshipped in the said new building with the said regular Baptist church.

But these defendants do expressly deny that they ever seceded from the Baptist church, or departed, either in worship, discipline, faith, doctrine or church government, from the regularly established and well-known usages of the said Baptist church, as held in the United States by all Baptist churches of sound religious faith and good standing. And these defendants do deny-

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that they have erected or established amongst themselves a new body within the limits of the ancient society, as the complainants have set forth in their bill of complaint; but they affirm it to be true, and insist that they, the said defendants, are and have always been connected with the ancient regularly constituted body corporate and politic, incorporated in the year 1786, and that the same is now and hath always been in full force.

And these defendants further answering admit that in consequence of an erroneous belief of some of the Baptist society that the incorporation of July 3d, 1786, had not been recorded, a search was instituted, and on several occasions prior to the year 1840, and since, efforts were made to find such record, but without success, and it was the universal wish of all the church and congregation that some steps should be taken to supply an omission of consequence to the whole society; no dissenting voice was heard, and all united on this as proper and necessary. Accordingly, counsel was sought and given, and on or about the 4th of February, 1844, the church and congregation, after legal notice had been duly given, and under the full but erroneous belief that no such record was in existence, held a meeting, elected the same trustees, assumed the same name as was originally given in 1786, took the oaths, and certified the proceedings to the clerk of the county, as required by law.

And these defendants further answering say, that within a very short time after the said trustees had been chosen as aforesaid, and before any act or thing had been done in any degree affecting the said Baptist society, or its property, the record of the act of incorporation of July 3d, 1786, was found inserted in one of the road books of the clerk's office of the county of Salem, instead of the book of miscellanies, where such proceedings are in all other cases recorded; but these defendants earnestly insist, that William Johnson, William R. Seagrave, Henry Freas, John W. Challis and Stephen Mulford, then living, and all of whom, on the 4th day of February, 1844, were regular trustees of the said corporation, and are so admitted by the said complainants in their said bill of complaint, did not, on that occasion, or at any other time, resign their office of trustees, or do any act or thing to give up, abate, destroy or surrender any of

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their rights, powers, privileges or duties under the said original charter of July 3d, 1786. And that on that day the said several persons were severally in the full exercise of all the rights and powers which were ever conferred upon them by operation of law, under the said ancient act of incorporation; and that the same rights, powers and privileges still continue in full force, and are held to the same degree and extent by the said William Johnson, William R. Seagrave, Henry Freas, John W. Challis and Isaac English, who have been duly elected to fill a vacancy and perpetuate the succession.

And these defendants further answering say, that these defendants consider the said William Robinson to be a regular trustee under the charter of 1786, and he has acted as such with the said William Johnson, William R. Seagrave, John W. Challis, Henry Freas and Isaac English, since the said fourth day of February, A. D. 1844, by superintending the erection of the said new building, the sale of the town lots devised by Mary Dunlap, attending said sales and fixing conditions of sale, and signing the same with his own proper signature, by attending at the new meeting-house since its completion at the time of renting the pews, and aiding the other trustees in renting the same, and sundry other official acts; and the defendants do aver that the said William Robinson never did dissent, as far as they know or believe, to the erection of the new meeting-house, but, on the contrary thereof, was, as these defendants believe, entirely willing that it should be erected, and was one of the building committee, and active in its construction; and that the said William Robinson, on the day of the dedication of the new edifice, to wit, on the twelfth day of December, A. D. 1846, attended a meeting of the trustees held in the said new meeting-house, took part in the business and voted with the said trustees, refusing to give to the said Henry Miller, or any of his associates, the keys of the old house.

And the said defendants further in answering say, that at the meeting of the said Baptist congregation, held on the said fourth day of February, A. D. 1844, for the purpose of electing trustees, as above set forth, Henry Miller, William Brown and others of the said complainants were present and took part in all the proceedings, without dissent or objections, and that every act and

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proceeding had and done on that occasion, was conducted in a peaceable, harmonious and proper spirit; that it seemed to be the well-meant effort of a Christian church and congregation to correct what was then erroneously supposed to be an omission affecting their corporate rights, and as such acquiesced in by all the church, and by all the members of the congregation in the proper spirit, and that the mistake having been very soon discovered, no use was made of the said proceedings, and no vote or act given, done or attempted under the said act of February 4th, 1844, in the slightest degree affecting the said society or conflicting with the original act of 1786, and that the said trustees who were in office prior to that day, are so still in the full exercise of all their corporate rights, and that they constituted a majority of the board of trustees with whose concurrence all official acts have been since transacted.

And these defendants further answering say, that after the said Baptist society had, by their aforesaid resolution, removed their regular place of worship to their new edifice, the old meeting-house was locked up on Sabbath day, after the usual worship; the gates also were locked by Isaac English, the president of the board of trustees, and every part of the said church property, including the burial-ground, was in the peaceable possession of the said trustees, as the same had always been in their predecessors' under the ancient charter of 1786, and so remained until, to the great surprise and regret of the said trustees, the said Henry Miller, William Brown, Adam H. Sickler and others of the complainants, aided by a number of evil-disposed persons, on or about the thirteenth day of December, A. D. 1846, forcibly, illegally, and with strong hand, broke and entered the yard gates of the said old meeting-house, so in possession of the said ancient society or corporation; and on the nineteenth day of December, A. D. 1846, broke and forcibly entered the old meeting-house, and put on new locks and fastenings, setting at defiance the rights of the said corporation, and disregarding the laws of the land, and uttering threats of personal violence against any of the trustees who should attempt to interfere with them.

And the said trustees, defendants aforesaid, after time for reflection and consultation, and deeply impressed with the injury

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with such conduct of professing Christians was calculated to do to the cause of religion, and really desirous as long as possible to avoid collision and controversy with the said complainants, determined that they would permit them to worship in the said house, with the earnest hope that the Dispenser of all good would so far enlighten their understandings and subdue their evil inclinations that harmony might again be restored and Christian union re-established ; but at the same time these defendants fully admit, as the complainants allege in their bill of complaint, that the said trustees, defendants, " have declared themselves to be the only ancient corporation " of the said Baptist church, " and as such entitled to, and claiming the use, possession and property of the original body corporate and politic ; " but these defendants deny that the said trustees, or any of the defendants, have threatened to use any force or violence, or to make any illegal or other entry upon the said premises, unless compelled in self-defence to save their altars from violation, and to secure the right of interment for the dead.

And these defendants further answering say, they admit that a vote was taken, as the said complainants have in their bill of complaint alleged, as to the propriety of tearing down the old house and using the materials thereof, and that it was decided in the negative ; but these defendants, though many of them thought and all of them are now convinced by sorrowful facts, that it would have been much better to have torn it down, yet they all submitted without a murmur to the will of the majority, and have since abandoned any idea of tearing down the said old house, nor have they, or any one of the said defendants, any intention to tear it down or otherwise injure it.

And these defendants further answering admit that the said Henry Miller and his associates did meet and hold such pretended election of trustees, and take such oaths as the said complainants have in their said bill set forth ; but these defendants do insist, and are ready to maintain and prove as this honorable court may direct, that such election was utterly without legal authority and void ; that at the time of such meeting and pretended election, there was but one regular Baptist church and congregation in the town of Salem, and that was the church and congrega-

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gation to which these defendants were then and are now attached ; that the said Henry Miller and his associates, at the time of said meeting, and still are but a small minority of the Baptist society to which they were formerly attached, and from which they are now seceders and disorganizers ; that they have violated the discipline and church government of the Baptist church, have broken their articles of church government, and brought contempt upon the cause of religion.

And these defendants further answering say, that, at the time of such meeting and pretended election, the said Henry Miller, William Brown, George V. Mitchell, and such of their associates as had formerly been members of the Baptist church, were under the censure of the regular Baptist church in the town of Salem, for breach of their church covenants and unchristianlike conduct, and that they have since been disowned and deprived of membership, and that not one of the said complainants is now a member of a Baptist church, according to its ancient faith, usages and discipline, nor could the said Henry Miller, or any of his associates, be now recognized as a Baptist church by any Baptist church in the United States, of good faith and standing ; nor could they be admitted as a Baptist church into the Baptist Association of the State of New Jersey, or be recognized as such, or admitted to any of the privileges of a Baptist church, according to the ancient usages, faith, discipline and church government of said society.

And the said defendants further answering admit that there is connected with the said old meeting-house, and adjacent thereto, a burial ground belonging to the said ancient Baptist society, and these defendants insist that for more than half a century the members of the said Baptist society, and persons connected therewith by ties of blood and otherwise, have been buried there. Amidst all the conflicts of party, whether in church or state, and in all the past history of this ancient society, no human being has heretofore been found, who sought to shut out from interment in this resting place of the dead, any of the members of said Baptist society. In this consecrated ground the bones of those dear to these defendants are laid ; there have been set apart family lots for burial places for some of these defendants, and

others have erected family vaults, holding the remains of their loved and lost: there, side by side, having been laid father and mother, husband and wife, parent and child, brother and sister; and there is not one of these defendants that cannot point out, in that ancient burial-ground, the grave of a relative or friend, nor is there one who has not hoped, when his own career on earth was ended, to be laid in that burial-ground of his ancestors, by the side of those whom they so loved on earth, and hoped to meet in Heaven. And these defendants do, with all possible respect for this honorable court, firmly protest that the right of interment for the dead is a most sacred privilege, which ought not to be interfered with or prevented by any order of this or any other court; that it is so esteemed and regarded in every land beneath the sun, where Christianity is established, and that to deny it to these defendants, and to more than one thousand souls, who, as these defendants solemnly insist, are this day entitled to interment in the burial-ground of the Baptist society at Salem, of which they are wholly deprived by the injunction of this court, is a wrong of the most alarming and serious character, and calls for the prompt action of this honorable court, and more particularly so when, as these defendants insist, there is no other burial-ground for the Baptist society within six miles of the town of Salem, and none intended or expected to be made at their new meeting-house, or elsewhere. And the said John W. Challis, Charles Mulford, John P. McCune, and Jacob Mankin, answering for themselves and the said defendants, say that the board of trustees of the said Anti-Pædo-Baptist Society, at a regular meeting of said corporation, appointed the said John W. Challis superintendent of the burial-ground; and it became one of his duties, when application was made for burials, to point out the place of interment; that the said Jacob Mankin was the gravedigger of the said Baptist society, and that Charles Mulford and John P. McCune were members of the said church, and interested in all its concerns; that on the said several days and times set forth by the said complainants, funerals had been appointed, the bodies of the dead were awaiting interment in the said burial-ground, when it was found necessary, in order to secure the right of Christian interment for the dead, and counteract the inhuman

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conduct of the said Henry Miller and his associates, that the gates should be opened, and the ground broken and the graves dug, which was accordingly done, under the full sanction and authority of "The Trustees of the Anti-Pædo-Baptist Society, meeting in the town of Salem, in the State of New Jersey," as they lawfully might do. But these defendants expressly deny that they took to their aid any "posse," or used any violence, or uttered any threats or menace, as alleged by the complainants, but that they proceeded in a quiet but firm manner to the performance of a painful but conscientious duty, and in a manner calculated to prove and maintain their own rights, which they know to be both sacred and well established.

And these defendants, further answering, admit that the said Henry Miller and his associates did apply to the Supreme Court of New Jersey, at or about the time specified, to obtain the "leave of the court for the attorney-general to exhibit an information in the nature of a *quo warranto* against the said William Johnson and others, for usurping, intruding into, and exercising the office of trustees of the Anti-Pædo-Baptist Society." And these defendants admit that, after argument, the said Supreme Court did not grant the leave asked for, but did grant a rule to show cause, with leave to take affidavits, to be heard at the next term of the said Supreme Court. And these defendants had well hoped that the said complainants would have been content to await the full examination and decision of the said cause and controversy, in all its bearings, before tribunals competent to settle this dispute, and where these defendants will be ready and willing to meet them, and where these defendants insist that the respective rights of the two parties can be fully settled, and that the said Henry Miller and associates would have not invoked the extraordinary power of this honorable court, to harass, oppress, and injure these defendants, and to obtain, for the first time in the history of the State of New Jersey, an injunction restraining and preventing the right to bury the dead in their ancient burial-ground.

And these defendants admit that Mary Dunlap did, about the time and in the manner alleged by the complainants, make such devise of real estate to the said corporation as the complainants

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have in their said bill of complaint set forth, and these defendants insist that the said Mary Dunlap meant and intended to vest in the trustees, acting in concert with the said Baptist church; a discretionary power to sell the said lots so by her devised, whenever, in the opinion of the said "trustees," with the said church, "it would be most to the advantage for the support of a minister for the said church," and the said trustees, having derived from the said lots but a very small annual income, and believing that the support of the minister could be increased, and the interests of the church promoted by a sale of the said lots, took measures to bring the subject before the church at one of their regular monthly church meetings, and, at such meeting, the church united with the said trustees in the belief that it would be most to the advantage and for the support of a minister, for the said church to sell the said lots, and a resolution was passed, without a dissenting voice, to sell the said lots, and accordingly the trustees sold a portion of the property so devised by Mary Dunlap, and used the funds as authorized to do by the resolution passed on the 20th of December, 1845, and hereinbefore set forth, and the defendants insist that the sale of said lots has been found greatly to the advantage of the minister; that while the said lots were rented and applied, with the pew rents of the old meeting-house, to the support of the minister, the whole annual receipts never exceeded \$300, and since the erection of the new edifice they have greatly enlarged accommodations; many persons who never before attended have joined the congregation, and the annual revenue to be derived from all their pews will be \$1066; the larger number being already rented for the sum of \$830 or thereabouts.

And these defendants insist that the proceeds of the sale of the said lots has had the effect to increase the salary of the pastor of the said church, and that all the funds received by the said defendants, trustees, from the rent of pews in their new edifice, have been applied to the support of the gospel, the payment of clerical services, and other church purposes; that no part of the said fund so derived under the will of Mary Dunlap, has been wasted or mismanaged; and these defendants do insist that the said trustees have faithfully carried out the will of Mary Dun-

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lap, according to its true intent, spirit and meaning.

And these defendants, further answering, say that the said Henry Miller, William Brown and Adam H. Sickler, three of the complainants, have, from time to time, since the said 4th day of February, 1844, acknowledged and recognized the full right and official power of the said William Johnson, William R. Seagrave, John W. Challis, Henry Freas and Isaac English, as trustees of the Anti-Pædo-Baptist Society aforesaid. That the said Henry Miller, in the fall of 1846, on the death of his son, applied in the usual mode to the said trustees through George Kirk, their sexton, and obtained leave of burial in their yard; that the said Henry Miller and William Brown, in the month of October or November, 1846, were appointed by the regular Baptist church a committee to make assessments on members for expenses for said church, which office they accepted and the duties of which they performed without objection to the authority or power of said church; and the said Adam H. Sickler, on or about the — day of —, 1847, and since his pretended election of trustee, has paid to Jonathan Belton, an officer of the said regular Baptist church, acting with these defendants, the church-tax due from his wife to said Baptist church, and at the same time the said Adam H. Sickler paid to Henry Colgar, the regular appointed collector of said Anti-Pædo-Baptist Society, the pew rent due from said Adam H. Sickler to the said Baptist church for his pew in the old house, thus admitting to its full extent the rights of these defendants as the regular Baptist church, under the original ancient charter of July 3d, 1786.

And the said John W. Challis, answering for himself and the said defendants, says that he has not at this time any distinct recollection of the different conversations that he has held with the several persons as set forth in the said bill of complaint, but he expressly denies that he has ever said to William Darmon, in his lifetime, or to "an elderly respectable citizen of the town of Salem," or to a "clergyman of the Baptist church," such things as are alleged by the said complainants in their said bill of complaint in that behalf.

And the said Henry Freas, answering for himself and the said defendants, admits that he has said to Henry Miller that it would

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be better for the church to divide, and that they would both prosper better separated, or words to that effect ; but the said Henry Freas expressly denies that he ever said to Henry Miller "that Isaac English and John N. Cooper were not legal trustees, as they had been elected under the new incorporation."

And the said William R. Seagrave, answering for himself and the said defendants, expressly denies that he ever said to any person in reference to any notice or advertisement of any kind whatever, posted up on the yard gate or elsewhere, "that they did not want anybody to read it," "they were afraid," nor any like expression whatever.

And these defendants deny all unlawful combination and confederacy in the said bill charged.

On the 17th June, 1847, a motion was made to dissolve the injunction.

Mr. Eakin offered to read affidavits in support of the injunction, to contradict which he said new matter was set up in the answer not responsive to the bill.

The counsel on the other side said that they should not rely on anything contained in the answer which was not responsive to the bill, if it contained anything not responsive.

The court said the affidavits could not be read.

R. P. Thompson and *J. C. Hornblower*, in support of the motion to dissolve.

A. L. Eakin and *P. D. Vroom*, *contra*.

THE CHANCELLOR. The controversy is between two bodies of men, each claiming to be the Trustees of Anti-Pædo-Baptist Society, or in another aspect, between two parties, one of which claims that the other has seceded. Each body claiming to be the trustees, or each party, by the body of men it claims to be the true trustees, asserts the right to the possession and care of the property of the Anti-Pædo-Baptist Society. This question of property and right of possession belongs to another tribunal.

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The interposition of this court, by injunction, was asked by the body or party claiming to be in possession of the old meeting-house and burying ground of the Anti-Pædo-Baptist Society, to restrain any entry thereon without their permission. When the answer came in, the true nature of the controversy was more fully disclosed to the court. And the question now presented is, whether the injunction granted on the reading of the bill should be continued, in view of the case as it now appears on the bill and answer.

It appears from the bill and answer, that the party in possession of the old building and burying ground do not refuse permission for funeral services and funerals, by the other party, from any unwillingness that such services and burials should be performed and made there; nor on the idea that such services and burials would be any serious injury to the premises. All they require is, that the other party shall ask permission to do so, and pay the usual charge, by way, I suppose, of recognizing their right.

The other party refuse to make such recognition by asking permission.

As to these funeral services and burials, therefore, the parties, as the case now appears, are standing upon no vital or very essential question. These funeral services and burials, without permission, would be at most mere trespasses, doing not only no irreparable, but no serious injury.

Under these circumstances, I think it is not a case in which this court should continue its interposition by injunction.

Trespasses, or alleged trespasses of this character, must be left to the law tribunals.

The injunction will be modified by being dissolved as to this part of it.

Order accordingly.

PREROGATIVE COURT,

JUNE TERM, 1847.

IN THE MATTER OF THE APPLICATION OF JOHN I. HOPPER
FOR THE APPOINTMENT OF COMMISSIONERS TO ASSIGN
DOWER TO MARIA HOPPER.

Testator died seized of lands in two counties, devising his lands in one county to A, and directing his executors to sell all the rest of his lands. An application by A to the Ordinary for the appointment of commissioners to assign to the widow of the testator her dower in the lands of which the testator died seized, was denied. *Semble*—The word “purchaser,” in Section 17 of the “Act relative to dower,” does not include a devisee.

Jacob I. Hopper presented a petition to the Ordinary, setting forth that John I. Hopper died seized of lands situate in the counties of Bergen and Hudson, leaving Maria Hopper, his widow, entitled to dower therein; and that he, the petitioner, is one of the heirs-at-law and devisees, and praying the appointment of commissioners to assign to the said widow her dower in the lands whereof the testator, the said John I. Hopper, died seized.

The notice of the application was, that John I. Hopper, one of the heirs-at-law and devisees, would apply for commissioners.

An action was pending in the Supreme Court, brought by the widow against the petitioner for her dower in the lands in Bergen county.

The application was opposed.

Dower of Maria Hopper.

E. R. V. Wright and W. Halsted, for the application.

P. D. Vroom, contra.

THE CHANCELLOR. The old act, to be found in *Elmer* 145, provides that it shall be lawful for any widow entitled to dower in any lands of which her husband died seized, or for any heir or heirs, or guardian of any minor child or children, entitled to any estate in said land, to apply to the Orphans' Court for the appointment of commissioners to assign to such widow her dower in the said lands. Devisees are not mentioned in the act.

It is further provided by the said act, that where a husband shall die seized of lands in two or more counties, it shall be lawful for the Ordinary or Surrogate-General to appoint commissioners to set off the dower.

The Revised Statute (*Rev. Stat.* 75, § 17,) provides that it shall be lawful for any widow entitled to dower in any lands of which her husband died seized, or any heir or heirs, or guardian of any minor child or children, entitled to any estate in the said lands, or for any purchaser thereof, to apply to the Orphans' Court for the appointment of commissioners to assign dower. And Section 21 of this act provides that when a husband shall die seized of lands in two or more counties, it shall be lawful for the Ordinary to appoint commissioners.

The question presented is, whether, on the application of a devisee of the lands in Bergen, for the appointment of commissioners to assign dower in all the lands of which the testator died seized in both counties, the Ordinary can make the appointment.

It is difficult to understand what the intention of the legislature was in introducing the words "or for any purchaser thereof," in the last statute. The provision of the statute is, "That it shall be lawful for any widow entitled to dower in any lands of which the husband died seized, or for any heir, &c., entitled to any estate in the said lands, or for any purchaser thereof," &c.: this is the connection in which the words are found. Is the word purchaser, in this connection, to be taken as including a devisee?

Dower of Maria Hopper.

If the husband dies intestate, the estate descends to the heir, or to all the heirs together. If the heir, or heirs all together, sell to a purchaser, there can be no difficulty in allowing him the same right to apply for commissioners to assign dower as the heir or heirs had. If one of several heirs sells his interest, the purchaser from him would stand in his place, in reference to any proceedings for the assignment of dower.

But where there is a will devising a part of the testator's lands to one, and a part to another, can either devisee apply to the Orphans' Court and obtain an order for commissioners to assign dower in all the lands of which the testator died seized; or, if the testator devises his lands in one county to one person, and his lands in another county to another person, can either devisee apply to the Ordinary and obtain an order for commissioners to assign dower in all the lands, in both counties?

It is clear that, under the original act, a devisee could not apply for commissioners to assign dower. The omission of devisees in this act shows, as we must infer, that the legislature were aware of the embarrassments which would be produced by extending that act to devisees. They are many, and would be very perplexing, and, in view of them, I cannot suppose that the word "purchaser," in the late act, was intended to include devisees.

The petition and notice in this case are, I think, defective. They state that the application is made by the petitioner, as heir and devisee, without any explanation.

There is also difficulty growing out of the pendency of an action in the Supreme Court, by the widow, against the petitioner, for her dower in the lands in Bergen county, but I do not find it necessary to consider this objection particularly.

Application denied.

CASES IN CHANCERY.

SEPTEMBER TERM, 1847.

FREDERICK ADAMS, EXECUTOR OF JOHN I. TUERS, DECEASED, AND IN HIS OWN RIGHT, WILLIAM DEALING AND CHARITY, HIS WIFE, JACOB FREDERICKS AND JACOB KING, v. JOHN I. RYERSON AND ABRAHAM DEMAREST, PETER H. PULIS AND PETER H. WINTER, EXECUTORS OF ABRAHAM H. GARRISON, DECEASED.

1. In 1823, T., an habitual drunkard, requested R., at whose store T. was in the habit of buying liquor, to accept a deed for his farm, and pay his debts. R. did not consent. Afterwards T., without the knowledge of R., procured a deed from him to R., to be drawn, and executed and acknowledged it, and took it to R. and delivered it to him, and requested him to put it on record, and left it in his hands. R. did not put it on record, but it remained in his hands. On the 20th August, 1831, an instrument was executed by R., by which he, in consideration that T. pay yearly during his natural life, to R., \$18, granted, bargained, remised, released and confirmed unto T., during his life, the said farm in T.'s possession. After this, R. caused the deed to be recorded. T. never saw or heard read the writing of August 20th, 1831. The person who drew this writing testified that before it was drawn, T. had consented that such a writing should be made, and requested him to keep it in his possession.

2. The deed was declared void. *Seemle*, a deed, without consideration, from one whose mind has been greatly impaired by excessive and long-continued intemperance, to another from whom he had been in the habit of buying liquor, and who knew of his excess in the use of it, will be set aside.

The bill, filed September 8th, 1845, states that John I. Tuers, late of the county of Bergen, deceased, in his lifetime, and on or about the 1st day of May, 1823, and for more than twenty years previous thereto, was seized in fee simple of a certain farm or tract of land, whereon he resided, in the township of Franklin, in the county of Bergen, bounded, &c., (describing it,)

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containing one hundred and eighteen acres, more or less ; that said John I. Tuers, on or about the first day of May, 1823, having then been for many years married to Margaret Tuers, his then wife, and who is now his widow, they having no children, and believing they would have no children together, and the said John I. Tuers having become very intemperate, and living in some degree dissatisfied with and exasperated against his said wife, and for a time separated from her on that account, and being desirous of securing his own estate for the benefit of his own relations by blood, or such of them as he might prefer for that purpose, and being wrongly advised that in the event of his said wife surviving him, upon his death without issue, she would unavoidably inherit the whole of his estate, he did, for the purpose of preventing such an event, and to secure his estate from her and to his relations, on said first day of May aforesaid, execute to one John I. Ryerson, a deed of bargain and sale of the above described lands in fee simple, which deed bears date on the first day of May, 1823, and purports to be in consideration of \$3000, to the said John I. Tuers, paid by the said John I. Ryerson, and to convey said lands to said John I. Ryerson in fee simple for his own use ; that said sum of \$3000, or any other consideration, was not paid, or secured to be paid, by said John I. Ryerson to said John I. Tuers, either at the giving of said deed, or at any time afterwards ; and that said deed was not intended to convey said property to said John I. Ryerson for his own use, but for the use only of said John I. Tuers and his heirs or devisees, and for the purpose of preventing the same from falling into the hands of his said wife, as above mentioned ; and charges that said deed, so given without consideration, and for the purpose aforesaid, did not convey said lands to said John I. Ryerson, but that, both at law and in equity, the uses of said conveyance resulted to said John I. Tuers and to his heirs and devisees.

That said John I. Tuers, from the time of said conveyance until the time of his death, which was on or about the 7th day of April, 1842, continued in peaceable and quiet possession of said lands, using and claiming them as his own, and not in any way recognizing the title of said John I. Ryerson thereto, and that

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said John I. Ryerson has not, since the execution of said deed, exercised, or attempted to exercise, any control over said property, nor in any way attempted to obtain possession by law, either in the lifetime of said John I. Tuers, or since his death, but that it still remains in possession of Margaret Tuers, the widow of said John I. Tuers.

That said John I. Tuers remained in possession of said lands until the time of his death, claiming the same as his own, and maintaining that said John I. Ryerson had no right or claim thereto, and that the conveyance which he once executed to him for the said lands had been given up and canceled, and that said John I. Tuers, in his last illness, on the 26th day of April, 1842, made his last will and testament, and at that time was not seized, nor did he pretend to be seized, of any lands except the lands above mentioned, and by said will, duly executed and proved to pass real estate, he directed his executors to sell all his real estate, and, out of the moneys arising from the sale, to pay the complainant, Frederick Adams, \$300, and to divide the residue of the proceeds thereof equally among the lawful heirs of his three sisters—Rachel, who was the wife of Michael Moore, Mary, who was the wife of Jacob Fredericks, and Leah, who was the wife of John King—and appointed Martin Van Houten, Jr., and the complainant, Frederick Adams, executors thereof; which executors proved said will before the surrogate of the county of Bergen, and have probate thereof.

That said Martin Van Houten, Jr., died after the granting of said probate, and that the complainant Charity Dealing, the wife of William Dealing, is the daughter of said Rachel, who was the wife of Michael Moore, and was, at the date of said will, and now is, the only descendant and heir-at-law of said Rachel, who was the wife of Michael Moore; that the complainant Jacob Fredericks, is the son of Mary, the wife of Jacob Fredericks, in said will mentioned, and now is, and was at the time of the date of said will, the only descendant and heir-at-law of said Mary, the wife of Jacob Fredericks; and that the complainant Jacob King is the son of Benjamin King, now deceased, which Benjamin King, at the date of said will, and the death of said testator, was the son and only descendant and heir-at-law of Leah, the

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wife of John King, in said will mentioned ; that since the death of said John I. Tuers, said Benjamin King has died, leaving Jacob King, one of the complainants, his son and only descendant and heir-at-law, and having duly made and published his last will and testament, whereby he devised and bequeathed all his estate, real and personal, to the complainant, Jacob King, and appointed him sole executor thereof.

That said John I. Ryerson, on the 13th day of August, 1831, intending some future and secret fraud and mischief, left said deed to him at the office of the clerk of the county of Bergen to be recorded, and that the same was recorded in Book G 3 of Deeds for Bergen county, on pages 54 and 55, but that said recording was unknown to said John I. Tuers, who supposed said deed to be surrendered and of no effect ; and that said John I. Ryerson did not pretend to said John I. Tuers, at that time, to have any claim to said land, but that said John I. Tuers occupied the same, and leased part thereof to John S. Forshee, a relation of said John I. Ryerson, for the term of fifty years, with the knowledge of said John I. Ryerson.

That said Ryerson, on or about the 18th October, 1837, having for some time been indebted to one Abraham H. Garrison for money borrowed of him, and which was secured to the satisfaction of said Garrison, made and executed to said Garrison by the name of Abraham Garrison, and without his knowledge, a deed for the lands above described, excepting thereout the seven acres so leased by said John I. Tuers to said John S. Forshee, and then offered said deed to said Abraham H. Garrison in payment, or as collateral security for said loan ; he, the said Ryerson, well knowing that the conveyance to him, though absolute on its face, was without consideration and worthless, and supposing that, by conveying or mortgaging said lands to any third person for a *bona fide* debt or consideration he could render the original conveyance valid, and have the said lands appropriated to his own use ; and that said Abraham H. Garrison, well knowing said conveyance from John I. Tuers to John I. Ryerson to be without consideration, and by the meaning of the parties thereto, as well at law as in equity, to be for the use of said John I. Tuers, refused to accept such deed, either as payment or collateral security ; but that

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said John I. Ryerson, after repeated importunities, persuaded the said Abraham H. Garrison to accept the possession of said deed, said Garrison at the same time declaring that said deed was of no value ; and said John I. Ryerson, on or about the 9th day of October, 1835, procured said deed to Abraham H. Garrison to be recorded in the office of the clerk of the county of Bergen.

That said John I. Tuers had, on or about the 19th day of June, 1822, executed a mortgage on said lands, above described, to Baltye Demarest, to secure the payment of \$100, with interest, and that said mortgage had been assigned to one Albert N. Van Voorhis, who, on or about the term of ———, 1840, filed his bill in this court for the foreclosure and satisfaction of the same, and made said Abraham H. Garrison, as well as said John I. Ryerson, a party defendant in said suit; that said John I. Ryerson did not appear in said suit or answer said bill; that said Abraham H. Garrison, knowing the invalidity of the conveyance to said John I. Ryerson, refused to set up his claim to said lands, either as grantee or mortgagee, or to answer said bill, but, at the solicitation of said John I. Ryerson, permitted him to take said deed; and that said John I. Ryerson thereupon employed counsel, who filed an answer in the name of said Abraham H. Garrison, but which was not sworn to by him; that to said bill none of these complainants were made parties, except Frederick Adams, as executor of said John I. Tuers, but who, supposing the only matter which could be contested in said suit was the mortgage to Baltye Demarest, then held by Albert N. Van Voorhis, did not appear, but made default; that, in said suit, a decree was made for the sale of said mortgaged premises, and that, after paying the mortgage to the complainant, the sum of \$1328 67 should be paid to said Abraham H. Garrison, as the amount due to him on the debt which it was alleged said deed was given to secure by way of mortgage; and thereupon, on application of said Frederick Adams, said decree was opened and set aside, so far as relates to the payment of the proceeds of the sale, after paying the debt and costs of the complainant, with leave to contest said conveyance to John I. Ryerson and to Abraham H. Garrison, by filing an answer in said suit or by filing a cross-bill in this court.

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That said Abraham H. Garrison, after said decree, died, having made his last will in due form to pass real estate, and having appointed Abraham Demarest, Peter H. Pulis, and Peter H. Winter executors thereof, who have probate of the same, and that he thereby directed his said executors to sell and convey all his real estate.

That the complainants are unable to sell said real estate, on account of said conveyances so made by said John I. Tuers to said John I. Ryerson, and by said John I. Ryerson to said Abraham H. Garrison, and on account of said John I. Ryerson giving out and pretending that the same are valid, and were made in good faith, and that he intends to claim and take possession of said property under the same, and that they, or some person for them, have frequently and in a friendly manner applied to said John I. Ryerson, and to said Abraham H. Garrison, in his lifetime, and to his above-named executors, since his death, and requested them to deliver up their said conveyances of said lands to them, and to re-convey said lands to these complainants, for the uses declared in said will of said John I. Tuers, deceased.

The bill prays that said deed from John I. Tuers to said John I. Ryerson may be declared void and of no effect as against said John I. Tuers and the complainants, and that it may be decreed that the use of the lands therein conveyed resulted to said John I. Tuers forthwith, and vested the same in him in fee simple, and that said defendants may be decreed to re-convey said lands to the complainants, or one of them, for the use of the will of said John I. Tuers, and for such other and further relief as the nature of the case may require.

To this bill, John I. Ryerson put in the following answer :

That he admits that John I. Tuers, deceased, in his lifetime, and on or before the 1st day of May, 1823, and for some years before that time, was seized in fee simple of the farm, as stated in the complainant's bill ; that at that time, and for many years before, the said Tuers had been married to Margaret Tuers, his then wife, and who is now his widow, and they, having no children, lived very unhappily together ; he lived part of the time with her,

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and at some period has lived separate from her, and, having no relations in whose interest he felt any anxiety, he determined that his estate should not go to his wife, or to any of either her or his relations; and that the said John I. Tuers being, at that time, somewhat in debt, applied to this defendant, and offered to give this defendant a deed for his said property, provided this defendant would pay the debts of him, the said John I. Tuers; that this defendant did not, at first, consent to the said agreement, whereupon the said John I. Tuers, without the knowledge or consent of this defendant, procured a deed to be drawn and acknowledged, and brought the same to this defendant, and insisted upon this defendant's putting it upon record; that thereupon the said John I. Tuers went away, leaving the said deed in this defendant's hands. But this defendant denies that the said John I. Tuers, either at this time or at any time afterwards, proposed to give the said deed to this defendant, or that he was ever advised by this defendant to do so, because, in the event of his wife surviving him without issue, she would inherit the whole of his estate, or that he did it for the purpose of securing the said estate to his own relations, but, on the contrary thereof, the said John I. Tuers declared to this defendant that he would not leave his property to either his own or his wife's relations; that this defendant admits that the consideration stated in said deed was \$3000, but this consideration was put in as a nominal matter, and this defendant was not to pay the said sum of \$3000. He admits that the said John I. Tuers, from the date of said conveyance until he died, continued in possession of the said farm.

He saith that the said deed remained in this defendant's hands for a considerable period; that the said John I. Tuers repeatedly requested this defendant to put the said deed on record, and that, on or about the 20th day of August, 1831, the said John I. Tuers came to this defendant, and insisted that this defendant should accept the said deed and pay his debts, declaring that his family should not have his property, and that if this defendant would not take the deed and pay his debts, or relieve him from trouble on account of his debts, he would give a deed to some stranger; that, being thus urged by the said John I. Tuers, this

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defendant agreed to and with the said John to take a deed for the said property, and to pay the debts of the said John, which he then owed, except a debt of \$100 to one Baltye Demarest, for which said John had given a mortgage on the said farm, and which debt, being an encumbrance on the said property, this defendant agreed to pay the interest upon, and, if necessary, to pay the principal, if it should be required, so that the said John should not be troubled with the same; that thereupon the said John I. Tuers and this defendant agreed to the same, and this defendant agreed to allow the said John to live upon the said property, and to execute to him a lease, so as to permit the said John to occupy and enjoy the same during his natural life, as hereinafter stated; that then the said John and this defendant agreed to go to one Garret Van Dien and see whether the deed already given was sufficient, and if not, to get him to draw a new deed and lease; that thereupon the said Garret Van Dien informed said John and this defendant that the old deed was as good a deed as he could draw, and they then instructed the said Van Dien to draw a lease from this defendant to the said John I. Tuers; which lease the said Van Dien then drew, and this defendant then signed and sealed the same, and which lease is in the words and figures, or to the purport and effect following, that is to say: "This indenture, made the twentieth day of August, in the year of our Lord one thousand eight hundred and thirty-one, between John I. Ryerson, of, (&c.,) of the first part, and John I. Tuers, of, (&c.,) party of the second part, for and in consideration that the said John I. Tuers must pay the sum of eighteen dollars yearly, and every year, during his natural life, unto the said John I. Ryerson, party of the first part, the receipt whereof is hereby acknowledged, have granted, bargained, remised, released, and confirmed unto the said party of the second part, in his actual possession now being, and to him for and during his natural life, all that certain tract or lot of land and premises situate, (&c.,) containing about one hundred and eighteen acres, be the same more or less, except thereout the privilege to the said John I. Ryerson, party of the first part, to cut and carry away timber, at any time he sees fit, from said premises—together with all and singular the hereditaments and

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appurtenances thereto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, of the said party of the first part of, in, and to the above bargained premises, with the hereditaments and appurtenances—to have and hold the said lot of land and premises above described, to the said party of the second part, for and during his natural life, except thereout as is hereinbefore excepted; also to pay the aforesaid sum of eighteen dollars yearly, and every year, during his natural life, as it is hereinbefore expressed.”

He saith that the said John I. Tuers then and there requested the said Garret Van Dien to keep the said lease for him, and requested him, also, to take the said deed to the clerk’s office to be recorded; and the said Van Dien accordingly took the said deed to the clerk’s office, on the 30th day of the same month of August, aforesaid, and the same was then recorded in the clerk’s office of the county of Bergen; and the said Garret Van Dien kept the said lease in his custody, and it remained in his custody at the death of the said John I. Tuers; and this defendant insists that the whole of said proceedings were done in good faith and *bona fide*.

He saith that after receiving the said deed as aforesaid, and executing the said lease, he, in pursuance of said agreement and purchase of said property, as aforesaid, commenced paying the debts of the said John I. Tuers; and that at the time of receiving the said deed, the said John was indebted to the said John I. Ryerson, Jr., on a promissory note, bearing date June 11th, 1829, for seventy dollars, with interest, and also on another note for thirty dollars, with interest, dated the 1st day of November, of the same year, and also another note for twenty dollars, with interest, dated March 28th, 1820, and also the said mortgage and some small debts besides; that this defendant took up the said three notes, and paid, at first, three years’ interest on the said mortgage, and afterwards, as he thinks, two years’ interest further on said mortgage; but for greater certainty, this defendant begs leave to refer to the endorsements on the same; and that this defendant has paid all the debts of the said John I.

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Tuers, so far as he has heard of them, except one claim, which the said John I. Tuers said was not an honest claim, and which he would not allow this defendant to pay, and which was an old and outlawed claim, and which the holder of the claim never thought fit to prosecute.

He admits that the said John I. Tuers continued to occupy the said farm, under said lease, until he died, and that this defendant did not attempt to exercise any control over said property during the lifetime of said John I. Tuers, except that this defendant has, at different times during the lifetime of said John I. Tuers, entered on said farm, and cut and carried away wood and timber from the said farm, according to and in pursuance of the right reserved to this defendant in the said lease; and the said John I. Tuers never paid any rent on said lease, and this defendant never called on him for any rent.

He admits that the said John I. Tuers did lease a part of the said farm to John S. Forshee for fifty years, but that the said lease was made to the said John S. Forshee on the 12th day of March, 1831, and before this defendant became the owner of the same, as before stated, and that the part so leased to the said John S. Forshee contained seven or eight acres.

He saith that, being indebted to one Abraham H. Garrison in a sealed bill and a promissory note, given by this defendant to the said Abraham H. Garrison, the sealed bill for the sum of \$991, with interest from date, and bearing date the first day of May, 1834, and the promissory note for \$50, with interest, bearing date the 20th day of January, 1837, the said Abraham H. Garrison, on the 18th day of October, 1837, conveyed the said land and premises, excepting thereout the seven acres, more or less, leased by said John I. Tuers to John S. Forshee, as before stated; but this defendant insists that the said conveyance to Abraham H. Garrison was intended as a mortgage, and that this defendant is entitled to the proceeds of the sale of the said property, after paying the mortgage of Albert N. Van Voorhis and the amount due to the executors of Abraham Garrison.

He admits that the said John I. Tuers executed a mortgage to Baltye Demarest, as stated in the complainants' bill, and that the said mortgage has been assigned to Albert N. Van Voorhis,

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and that he filed his bill to foreclose said mortgage, as is in the complainants' bill stated.

He admits that after a decree was entered in said suit, the said Abraham H. Garrison died, leaving a last will and testament, and having appointed Abraham Demarest, Peter H. Pulis and Peter H. Winter executors of said will, who have proved the said will, and that he thereby directed his said executors to sell and convey all his real estate, as this defendant has heard, but he has no knowledge of this, except from hearsay.

He admits that the said John I. Tuers is dead, and that he had no property at the time of his death, so far as this defendant knows; and this defendant has heard, and believes it to be true, that the said Frederick Adams, during the last illness of the said John I. Tuers, when he was enfeebled by age and infirmity, represented to the said John I. Tuers that the deed he had given to this defendant was invalid, and that this defendant had absconded and left this part of the country, and wished him to make a will, giving to him, the said Frederick Adams, some part of his property; that the said John I. Tuers for a long time refused, stating that he had already conveyed the same to this defendant, but that, finally, overcome by the importunities of the said Frederick Adams, who was not related to the said John I. Tuers, but who married a distant relative of the said Margaret Tuers, this defendant has heard that the said John I. Tuers did make a will, as stated in the complainants' bill; but this defendant insists that the said will of the said John I. Tuers, so far forth as regards the said property of this defendant so conveyed by the said John I. Tuers to this defendant, is inoperative, because the right of the said John I. Tuers in the same, being for his natural life, was determined by the death of the said John I. Tuers, and that neither the said Frederick Adams nor any of the complainants have any interest in the land so conveyed by the said John I. Tuers to this defendant.

He saith that he has never had possession of the lands contained in said deeds, but that, shortly after the death of the said John I. Tuers, this defendant took his deed to his counsel, and advised with him as to the mode of recovering possession of the said lands; and that his counsel, understanding that the lega-

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tees and devisees under said will, or some one of them, intended to contest the validity of this defendant's deed, advised this defendant that the better way would be to get Mr. Abraham H. Garrison to foreclose his mortgage, and make all the said persons parties, so that the rights of all the said parties could be determined in such suit, and the question put at rest forever; whereupon the said Abraham H. Garrison sent his papers to the said counsel; but, owing to the difficulty of ascertaining who were the legal devisees and legatees mentioned in said will, and where they resided, the said information could not be obtained before the said Albert N. Van Voorhis filed his bill to foreclose his mortgage, and that this was the only reason why this defendant did not proceed to get possession of the said farm.

He saith that this defendant, being justly and truly indebted to the said Abraham H. Garrison in two promissory notes—one for \$991 and some interest, and the other for \$50, and for which the said Abraham H. Garrison had no security, this defendant, in order to secure him for the said sums of money, executed to him a deed for the said property, but which it was agreed, between the said Abraham H. Garrison and this defendant, should be held as a mortgage only, and which bears date the 18th day of October, 1837, and which was recorded on the 9th day of October, 1838, in the clerk's office of Bergen county; but this defendant denies that the said Abraham H. Garrison refused to receive said deed as security, but insists that he did receive it, and held it until his death, as security for his said debt.

Answer of Demarest and others:

That they admit that John I. Tuers, deceased, and on and before the 1st day of May, 1823, and for some years before that time, was seized in fee simple of the farm, as stated in the complainants' bill; that, at that time, and for many years before that time, the said John I. Tuers had been married to Margaret Tuers, his then wife, and who is now his widow; and these defendants have heard, and believe, that they, having no children, lived very unhappily together, and that they at one time were separated.

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They admit that they have heard that the said John I. Tuers, many years ago, but at what time is not known to these defendants, conveyed the said farm to the said John I. Ryerson in fee simple ; but, as to the time of executing or delivering said deed, or of the consideration of said deed, these defendants have no knowledge, nor have they any knowledge of what the said Abraham H. Garrison had heard or knew about the same, at the time of his receiving the said deed from the said John I. Ryerson ; but these defendants have heard the said Abraham H. Garrison, since he so received the said deed, and while he held the same, say that he held the said deed as security for a sealed bill and a note given to him by the said John I. Ryerson ; and these defendants insist that the said Abraham H. Garrison, at the time he so received the said deed as security for the said debt, was a *bona fide* holder of the same, without notice of the consideration of said deed.

They say that they have heard and believe that the said deed was given by the said John I. Tuers in good faith and *bona fide*, and that the said Tuers, in order to secure to himself the use of the said property during his life, took from the said Ryerson a lease, which, by its terms, gave to the said Tuers the right to use and enjoy the said farm during his natural life.

They say that they believe the said John I. Tuers remained in possession of said farm until his death, and that some time after his death the said Abraham H. Garrison sent his papers to counsel to foreclose his said deed, considering it as a mortgage, and that they have heard that the said John I. Tuers made a will during his last illness, as set forth in the complainants' bill ; and these defendants have heard that the legatees and devisees in said will intended to contest the validity of said deed from said John I. Tuers to said John I. Ryerson, and that the said Abraham H. Garrison put his papers in the hands of counsel to foreclose his said mortgage, so as to settle all questions which might be raised regarding the validity of said deed ; but, as to the terms of said will, or as to the names of the legatees and devisees in said will named, these defendants have no knowledge, except from hearing.

They admit that they have heard that the said deed from the

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said John I. Tuers to the said John I. Ryerson was recorded, as is in the complainants' bill stated, and that they have heard and believe that it was left in the clerk's office to be recorded by Garret Van Dien, Esq., at the request and by the direction of the said John I. Tuers.

They say that the sealed bill and note, before mentioned as being the debt which the said deed to the said Abraham H. Garrison was given to secure, are now in these defendants' possession; that the said sealed bill bears date the 1st day of May, 1834, given by said John I. Ryerson, whereby, for value received, he promised to pay or cause to be paid to the said Abraham H. Garrison, or order, the just and full sum of \$991, with lawful interest from the date until paid, \$340 of the said sum to be specie, and which was sealed with the seal of the said John I. Ryerson; and that the note, being the other part of said debt, was dated the 20th day of January, 1837, given by said John I. Ryerson, whereby, for value received, he promises to pay, or cause to be paid, unto the said Abraham Garrison, or order, the just and full sum of \$50, on demand.

They say that they have heard that the said John I. Tuers was at times intemperate, but whether he was so at or about the time the said deed was given by said John I. Tuers to John I. Ryerson is not known to these defendants.

They say that they have never heard, save from the bill, that the said John I. Tuers gave the said deed to the said John I. Ryerson under the impression or advice that if he should die without issue, his wife would inherit his estate.

They say that they do not know whether the said John I. Ryerson made the said deed to the said Abraham Garrison without his knowledge, but these defendants know that the said Abraham Garrison held the said deed in his hands for many years before his death, and at the time of his death the said deed was in his counsel's hands.

They say that they have never heard, save from the bill, that the said Abraham H. Garrison refused to receive the said deed, either as payment or collateral security, but these defendants have heard him frequently say that he held the same as security for his said debt.

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They say that they have heard that Baltye Demarest held a mortgage given by said John I. Tuers, and that the same was assigned to Albert N. Van Voorhis, but these defendants had never heard of the same until the subpoena was served upon the filing of his bill in chancery, and these defendants have heard that said Abraham H. Garrison filed his answer in said suit.

They say that after the decree in said cause, the said Abraham H. Garrison died, leaving a last will and testament in due form to pass real estate, and that he appointed these defendants executors of said will, and that they have probate of said will, and that in his said will he directed his executors to sell his real estate.

Testimony for complainants :

William H. Winters.—I am sixty-eight years old, and have always lived in Franklin township ; I knew John I. Tuers in his lifetime ; knew him more than thirty years before his death ; in May, 1823, I knew him, and heard of his having given a deed to John I. Ryerson—the time when, I do not know ; at that time John I. Tuers was a very intemperate man ; had been so all along ; he said he must go to hell, and that he did not care what he was doing ; about, or at that time, he was frequently drunk, so that he was not able to do anything ; after the deed was given he got a little better, did not drink so much, but this was some time after giving the deed ; at the time, and before giving the deed, he was very generally drunk ; I lived about a mile from him at that time ; Tuers lived about one-half mile from Ryerson's ; at that time John I. Ryerson kept liquor to sell, and Tuers went there to get his liquor ; after the hubbub in his family, and his wife went to Paterson, Tuers went to Ryerson's and stayed there ; Ryerson kept a grocery, and sold liquor ; I have seen Tuers drinking there, and that he had too much liquor ; I don't know that Tuers lived there, but saw him there off and on ; Ryerson told me that Tuers was not fit to go to church, and he had given him a new suit of satinets, which his daughter Jenny made for him ; Tuers did not stay as much as a year at Ryerson's ; while at Ryerson's he was not a beast in drinking, that I saw ; not so that he laid by it ; but he had too

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much liquor; he was rash in talking; can't say whether he was worse while there than he had been before; I have heard say that before this Tuers had a quarrel with his wife, and she had left him, and gone to Lake's, at Paterson; Tuers and his wife, as long as I knew them, were quarreling with each other; I know the farm that Tuers lived on; he lived on the farm till he died, and for as long back as I can remember; since his death, his widow and Abraham Lake have lived on it, and still live there; I never heard John I. Ryerson say for what Tuers had given him the deed, but he talked to me about it afterwards, one day, on my field, and told me he had a good deed for the property from John Tuers, as good as anybody's deed, but did not say whether Tuers had given it or sold it to him; I never heard that he had given anything for the deed; can't say how long after the deed was given, it was that Ryerson told me this on my field—whether ten years, or how long after; at that time, Ryerson told me that his children might as well have it as Lake's children, as they always had a nest there to eat him up. [The solicitor objects, on the part of the executors of Abraham H. Garrison, to all the declarations of Mr. Tuers, or of John I. Ryerson; also objects, on the part of John I. Ryerson, to any declarations or conversations of John I. Tuers: this objection to extend to all subsequent testimony that may be offered.] I heard John I. Tuers say that he had given Ryerson the deed, but it was good for nothing, and he could get it back again at any time he wanted; this was towards the close of his life—a year or two before his death—a little while before he died, and he was by his senses when he told me; never knew that Tuers was out of his senses, except when he was drunk; then he was everything; when perfectly sober, he was a pretty good neighbor, and his mind then was good, so far as I know; when Tuers was in liquor, he was very wild—cursed and swore, and talked at the highest rate; when he began to drink, sometimes he took a long frolic, and stayed drunk as long as he could get liquor—some shorter and some longer; I don't know, of my own knowledge, that he was in one of his drunken frolics at the time his wife left him, and he went to Ryerson's.

Being cross-examined, deponent says—John I. Tuers never

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had any children at home or anywhere else, that I ever heard of; I don't think he was over eighty years of age when he died, but he was between seventy and eighty; I cannot say whether the hubbub which occurred in the family of Tuers when his wife went to Paterson, was before or after I heard of the deed being given; I cannot say that, at that time, Tuers moved to Ryerson's, nor that he made his home there, at all, but he was there sometimes; I don't know of his ever staying there three days in succession, as I was not there to see him every day; some years afterwards, he got quite over his drinking; he became quite a man, and talked quite like a different man; he lived a different life, it appeared, from what he had done; from that time on, he remained quite a different man; could not call him a drunken man from that time; I cannot say that he was drunk when the deed was given, as I was not present; Tuers could get liquor, always, on credit, when he wanted it, as I suppose, for he had a good property; I don't know that he could always get to it.

Lawrence John Ackerman.—I am fifty-six years old, and have always lived in Franklin township; I knew John I. Tuers as long as I can remember; I lived about one-half mile from him, till within nine years last past; I understood that Tuers had given a deed to Ryerson, but the deed may have been given six months, perhaps, before I heard it; at that time, when the deed was given, Tuers was in the habit of drinking some, and both before and after that; when he was a-drinking in his frolics, he was quite rough; when he was in the way of drinking, he was like other people when half drunk—not capable of doing business; about the time of the giving of the deed, he was not half the time drunk, but he took hard frolics; he was sober a good deal more than half the time; I saw him buy liquor wherever he happened to be when he wanted it; he bought it whenever he had a chance; I do not remember having ever seen him buy any liquor at John I. Ryerson's; Tuers and his wife were quite often in trouble—disputes between them; I think his wife was away at Paterson, one time, and think it was after the deed was given; I know there was once a vendue of personal property at Tuers', but who was the manager, I cannot tell; I don't know whether Ryerson collected the money of the vendue; Tu-

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ers' wife was there at the time of the vendue ; I think this vendue was before the deed was given ; at the vendue there was some of the household furniture sold ; cannot say how much ; I don't remember that anything else, except what was in the house, was sold ; I cannot tell that the vendue was while he and his wife were separated, but I know she was home at the vendue ; it was said at the vendue, among the people, that the vendue was made to spite and oppose his wife ; Ryerson was at the vendue ; he was around there ; I don't know that he had any management of any consequence ; he was helping hand out the things ; I have heard Tuers tell Ryerson how his wife was ; and Ryerson answered that if he had a wife like that, he would kick her out of doors ; this was about the time of the vendue, but not at the vendue ; after the vendue Tuers was sometimes home, sometimes at Ryerson's, and running about a good deal ; I cannot tell whether or not Tuers was in liquor at the time of the vendue ; at the time of the vendue, and before and after, Ryerson and Tuers were together a good deal, and Ryerson called him "Uncle John ;" he was not Ryerson's uncle ; during this time, while Tuers was in a frolic, he was a man of bad disposition, and would do mischief to any one he had a grudge against ; Tuers was a man easily persuaded to anything, and to all appearance, I suppose he was a good deal under Ryerson's influence at the time ; Tuers never told me that he would put his property out of his hands, so that his wife could not get it ; I never heard him make any threats about her ; I don't know that Mrs. Tuers was kept out of doors at the time of the vendue, but I know she was opposed to the vendue ; about eleven years ago, when I was at work mowing grass, Tuers came to me and after talking I told him he might rather have kept his property in his own hands ; he answered that that was all nothing, as they had an article between them, so that he could get the deed back again at any time he wanted to do so ; he did not tell me why he had done it.

And being cross-examined, deponent says—When Mr. Tuers was free from liquor, he was a sensible man and capable of doing business ; he was then a good-natured man ; when he was in liquor he was foolish, and would do almost anything ; I

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have never known him, whenever in liquor, to make bad bargains in buying and selling property ; he was in the habit of buying and selling ; the biggest part of the neighbors were at the vendue ; at the time of the conversation between Tuers and Ryerson, when Ryerson told him " that if he had a wife like that he would kick her out of doors," Tuers told him that his wife was carrying things to the neighbors, such as bedding out of the house, blankets, &c. ; he also complained that she was mischievous ; that she did not give him good answers ; that she quarreled with him, and had disputes with each other ; that he could not live in peace with her ; he did not complain to Ryerson that his wife was keeping with another man ; I never heard him complain of that ; I have heard a story of that kind in the neighborhood, that she kept with another man, but never heard Tuers had complained of it.

Being re-examined-in-chief, deponent saith—I have heard the story from others besides Ryerson, about Mrs. Tuers keeping with another man, and I have heard Ryerson talk about it ; I have heard this story from others besides those to whom Ryerson had told it.

Being again cross-examined, deponent saith—That Ryerson did not tell me that he heard Tuers speak about his wife in this way.

Elizabeth Van Houten.—I am sixty-seven years old, and have lived in Franklin over fifty years ; I lived about a mile from Tuers, and was well acquainted with him the whole time ; he was a very intemperate man ; many a night he has laid on the floor at our house ; I heard of the deed being given the same year he was in the habit of getting drunk ; it all happened when he was a drunken man ; I don't mean he was drunk at the time the deed was given, because I know nothing about that ; about that time he was at my house frequently ; was in the habit of coming there ; a fortnight before Tuers died, I was there at Tuers' ; he told me that he now felt so well satisfied in his mind that he had made his will ; that he wanted to send for Mr. Fredericks, but had no chance ; I asked him how he could make a will ? he said, why ? and I said to him, don't Ryerson own it ; the devil, says he, I have fixed it just as I wanted ; then I

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asked him if Ryerson had not a deed ; he said no ; what Ryerson had was good for nothing ; that Ryerson knew that the place belonged to him, (Tuers,) and that he willed it away ; afterwards I told this conversation to Mr. Ryerson, and he said that old Tuers would talk a good deal, but said nothing further about it ; Tuers lived on the place, and appeared to use it as his own up to the time of his death, the same as before the deed was given, as far as I saw ; I was present at Tuers' vendue ; household furniture was sold ; I don't know who held the vendue, but, at the time, it was said and understood that William Voorhis, who then lived on the place, and Mr. Ryerson, held it ; Ryerson was active about the vendue, and was giving directions there ; I think the vendue was before the deed was given, but cannot say how long ; it was held while Tuers and his wife were separated, while she lived at Lake's, at the Ponds ; she was at the vendue ; she got in the kitchen, but not in the house ; the neighbors kept her out ; Mr. Ryerson kept her out of the house ; Mr. Ryerson was the only one kept her out ; at the time Mr. Tuers was very much opposed and violent to his wife ; Tuers and his wife lived apart a year or a year and a half ; when Tuers was in his frolics he would talk that, out of his spite, he would put his property out of his hands, so that his wife could not get it ; I expect he meant out of spite to her and her friends ; at the time of the vendue, I believe Tuers was partly sober, so that he knew what he was about ; not very bad in liquor that day ; about the time of the vendue and the giving of the deed, I very seldom saw Tuers entirely sober ; at one time Tuers talked to my husband about giving him a deed for the place, that he would sell it to him, not give it to him ; and he said that he could not do it ; don't remember that he said he wanted to do it to keep his wife out of it ; he said he would sell it and frolic it up, so that nobody should have anything of it, but he would have all the good of it himself ; about the time the deed was given I have known him to go through the woods at our house, and get lost, and he would lie and halloo, and our folks would go and get him right again ; Mr. Van Houten, my husband, is dead.

Being cross-examined, deponent saith—when Mr. Ryerson kept Mrs. Tuers out of the house, he did not take hold of her to

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put her out ; I did not hear him tell her that she should not come in ; I did not see Ryerson do anything to her, but the door was shut ; I did not see him do anything, nor say anything to her, to prevent her being in the room.

Being again re-examined-in-chief, deponent saith—I heard Mrs. Tuers at the time complain that she could not get into the house ; she said that John Ryerson and William Voorhis kept her out ; I did not hear Ryerson that day say anything to Mr. Tuers about keeping her out of the room ; at that time Tuers was intimate with Ryerson ; they were very great neighbors.

Peter S. Demarest.—I live in Franklin, in the neighborhood of the Ponds ; I knew Abraham H. Garrison in his lifetime, now deceased ; I heard him say that John Ryerson offered to give him a deed for the Tuers property ; he told me this not longer ago than four or five years, and said that Ryerson owed him some money, and he was going south, and this was the only way that Ryerson could secure him for the money, by giving the deed ; that Ryerson had owed it some time ; he said that he did not take it, but had told Ryerson that he could leave it with his wife, Mrs. Ryerson, if he was going away ; he had not taken the deed from Mrs. Ryerson at the time of this conversation with me, and he said he thought the deed was as safe with Mrs. Ryerson as with him ; that he had the note, and they might keep the deed, that he did not want it ; Garrison has told me that he did not want the Tuers place, that he would rather have the money than the place ; Ryerson did go south, was gone a year or two, and returned three years ago last spring ; after Ryerson's return, I heard Garrison say that the Tuers property ought to be taken care of, but I don't know who he wanted to take care of it ; I have heard Garrison speak several times of the deed, and have heard him say that the deed from Tuers to Ryerson was a good deed ; I have heard Garrison say that Ryerson had had the deed from him to Garrison there for him, and wanted to deliver it to him, but that he did not take it ; I have heard Mr. Garrison say this more than once, but whether Ryerson had the deed there more than once, I don't know ; I have heard Mr. Garrison say this within three years ; I have heard him say that he did not want to spend any of his money to get

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the place ; that all he wanted was his own money that he had lent ; this was after John Ryerson had come back the first time ; I should say the Tuers place was worth from \$1500 to \$2000, but don't very well know the situation of the place.

Being cross-examined, says—I do not know whether Garrison ever refused the deed absolutely, but he has told me that he did not want the deed nor the place ; that all he wanted was his money.

Being re-examined-in-chief, saith—Three years ago this last spring I was in Pennington's office, at Paterson, with Mr. Ryerson and his two sons-in-law, when Mr. Pennington had a paper in his hands, and some of them three said, in the office, that that was the deed from Ryerson to Garrison.

Isaac J. Storms.—I am forty-six years old, and have always lived in Franklin, near the Tuers place—about one-quarter of a mile from it ; I have always known Tuers well, since I can remember ; about the time of the giving of this deed he was in very bad habits—quite an intemperate man ; I recollect of his being separated from his wife, and having a vendue to sell his personal property ; I cannot say what time it was ; I heard of Tuers giving the deed to Ryerson at the time it was done ; I believe this was about the time he was separated from his wife, or when he had the vendue ; at that same time he was quite an intemperate man ; many a time at night he came to our house, and would by all means go home ; I would take him through the woods, as he could not get home ; about that time, and for some time before and afterwards, he was more intemperate than he ever was, either before or since, and I did not, during that time see him much sober ; I saw him quite often, and pretty much all the time I saw him he was drunk ; I saw him very often ; can't say that I saw him every day, but we were close neighbors and on good terms ; when drunk, I should not think he was fit to do any business ; he was at such times a very bad man ; Ryerson kept a store in the neighborhood, to sell liquor ; I lived nearer to Tuers than Ryerson did ; he lived about a quarter of a mile from Tuers ; I have seen Tuers at Ryerson's, getting liquor, and saw him drink it there, but can't say that I ever saw him lying drunk there ; he did not often get down ; while Tuers

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lived separate from his wife, I cannot say that he had his home at Ryerson's; he lived at different places; I often saw him at Ryerson's; I don't know that Ryerson is any connection of Tuers; Tuers was separated from his wife about one and a half years, and during this time Tuers was away at Frederick's, in New York state, as he told me; who took him up there I cannot say; Tuers never told me that Ryerson took him; I was present at his vendue, but cannot tell who conducted it; there was a good deal of noise made there; Mrs. Tuers made a good deal of noise, and said they were selling her things that she got of her father, and she would not have it; I don't know whether Mr. Ryerson took an active part; I did not see Mr. Tuers much out of doors that day, and can't say how he was; I think the deed was given after the vendue; as far as I know, Tuers always continued in possession of the property up to the time of his death, and used it as his own; Ryerson has never had possession, nor made the least use of this property, that I know of; I came into the possession of a part of this same property after the deed for it was given to Ryerson, and have since held it, and still hold possession of it; I bought it of Abraham Lake, who had bought it, he said, of Tuers.

Being cross-examined, deponent saith—I bought it of Lake about ten or twelve years ago, more or less; my deed is not recorded; Lake had been in possession a few years when I bought it of him; I know Frederick Adams, the complainant; he is no relation of Tuers, that I know of; when I have taken Tuers through the woods, as above stated, I can't say where he came from, as it was night; he might have come from Ryerson's, or from another direction.

Being re-examined-in-chief, saith—I have heard Tuers speak of Ryerson's cutting wood on that place; he was very mad about it, and said it must be the last, or he would see what he had to do about it; this was not very long ago; might be five years ago, more or less.

Albert J. Storms.—I live in Franklin, less than a quarter of a mile from Tuers'; have always lived there; I was forty-nine years old the 25th of April last, and knew Mr. Tuers well in his lifetime; I heard of this deed to Ryerson at the time it was

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said to be given; I recollect the vendue, and of his being separated from his wife; this was at the time of the vendue; the vendue was a little before I heard of the deed being given; Ryerson told me that he had the deed, and that it was as good a deed as anyone's; he told me this more than once, but I don't remember the time; he told me this within three, four or five years after the deed was given; I am certain of this; told me more than once; at that time he did not tell me upon what condition he got Tuers' farm; about the time the deed was given, Tuers' habits, as to temperance, were very bad; he was more intemperate than any one I have ever known about our place; I saw him often—not every day—sometimes more than once a week, sometimes not so often; at that time, whenever I saw him, he was generally out of the way—sometimes he was pretty reasonable; I cannot say whether he was ever quite sober, as he was a very drinking man; when in liquor, he was a bad man—cursed and swore, and went on at the highest rate that I ever saw any one; up to the time of his death Tuers continued in the possession of the property, using it as his own; from his habits, during about all the time of his giving the deed and of the vendue, I did not think he was fit to do business; I believe he and his wife had a good deal of differences between them; at this time he was a good deal with Ryerson, at his place; I have seen him at Ryerson's store, but cannot say that I have seen him drinking there.

And being cross-examined, says—When he was sober he might be capable of doing business, but it was hard to find him sober; a few years after this he became quite a sober man, and, as far as I know, he continued so till his death; when he was sober, it seems he knew enough to do business, but he had no learning.

James I. Ackerman.—I live within half a mile of Tuers' place, in Franklin; I am nearly forty-four years old, and have always lived there; I knew Tuers the time of the vendue, and the separation from his wife; they were about the same time; I have heard Ryerson say he had a deed from Tuers; I cannot say whether he told me before the separation; it was about the time of the disturbance that the deed came out; Ryerson told

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me this about twenty or twenty-five years ago, about the time he got the deed, or soon after ; he told in my presence that he had got a deed of Tuers, and it was a good one, but that he did not want his property ; he did not say how Tuers came to give him the deed ; I can't say whether Ryerson told me this after Tuers and his wife lived together again ; I cannot recollect whether the separation was after the deed was given ; I don't know whether there was any disturbance about the deed being given ; Ryerson said that Tuers could have the deed any time, that he did not want it ; at that time Tuers was not a sober man, but a very intemperate man ; I saw him frequently, but not every day ; he was hardly ever sober when I saw him about this time ; I scarcely ever saw him about that time when he was in a fit condition to do business, to convey away his property ; when in that situation I have heard Tuers talk pretty rough about his wife ; heard him say that he would put his property away, that he did not care much how it went ; I heard Ryerson tell Tuers that if he had such a wife he would kick her, or that he would kick her out of doors ; this was in the time of the disturbance, while they were separated, but can't tell when exactly.

Being cross-examined, deponent saith—when Ryerson told Tuers about kicking his wife, &c., Tuers was making complaint about his wife, that sometimes she carried off things ; I did not hear Tuers tell Ryerson at this time about another man being after his wife ; I have heard Tuers say, more than once, when on a spree, that his wife had had connection with another man ; I have met Ryerson with wood on the road ; he was coming my road from my lot ; my lot adjoins Tuers' and leads to it ; from the course he was coming he must have got it from Tuers' lot ; I never found out that he got it from my lot ; the same time there was somebody cutting wood on Tuers' lot ; this was between four and six years ago.

Being re-examined-in-chief, deponent says—there was a road along by Tuers' house, to get the wood out ; but the way Ryerson came was the easiest for him ; the road by Tuers' was all the way over his land, without coming over mine, but that way there was quite a hill ; I am one of the witnesses to Tuers' will, and was present when he executed it ; I saw it

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drawn; Esquire Van Houten drew it, at Tuers', in his presence; Frederick Adams was not present; at this time Tuers said the property was his, and that the deed to Ryerson was not worth anything; he was asked about this deed, and this was all he answered; I should think it was a month or so before his death when he signed the will.

[The copy and probate of the will of John I. Tuers, deceased, is offered in evidence on the part of the complainants, and marked Exhibit C 2 on the part of the complainants.]

Being further cross-examined, deponent saith—that Esquire Van Houten was busy drawing the will at 'Tuers' when I came there; he wrote a considerable after I got there; whether he had written it all there I cannot say.

Margaret Lake.—I am forty-seven years old, and was brought up in the family of John I. Tuers; I was adopted by them when a child, and lived in their family until the year 1821; I had then been married seven years, when I moved to about a mile from Tuers' house, and lived there about four years, until the spring of 1825, when my husband and myself moved back to Tuers'; I then lived at Tuers' for four years; I recollect the time of Tuers being separated from his wife; it was during the first four years that I lived away from him, between 1821 and 1825; when I went back to them, in the spring of 1825, they had lived together again for one year; they lived apart about a year and a half; don't know that it was quite a year and a half, but over one and less than two years; while they were separated Mrs. Tuers lived with me, at my house, and during that time Mr. Tuers was a part of the time at John I. Ryerson's and a part of the time at his own house, I believe; he was backwards and forwards; it was generally understood in the neighborhood that Tuers resided at Ryerson's; during the time of that separation, and just before and afterwards, he was almost the whole time in liquor; I saw him quite often during that time, sometimes he came to my house, sometimes he passed by; I never saw him sober in that time, and when he was in liquor he was very unreasonable—the worst man that I ever saw when in liquor; Ryerson had had a grocery in the neighborhood for the sale of liquor for some years before I left 'Tuers' the first

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time, cannot tell how long ; after this grocery was opened, and Tuers got running there, he got a great deal worse than he had been before ; the year before I left there he got very outrageous ; when in a frolic he was very ugly to his wife, more so than to other people ; he treated me very kindly, even when he was drunk ; at one time I went to Ryerson's and saw Tuers there drunk, sitting there, and heard Ryerson putting him up against his family, and heard Ryerson tell him, that if it was him, he would clear the whole damned lot out ; when Tuers came home in liquor he was always ugly and quarrelsome towards his wife ; Ryerson was intimate with Tuers, but was an enemy to the family as long as I can remember ; when Ryerson came to see Tuers, he seldom or never came into the house, but sneaked around out of doors to find him ; at the time of his separation from his wife, I never saw Tuers sufficiently sober to do business ; from what I know of Tuers' habits before and at that time, I don't think he was ever, at that time, sufficiently by himself to do business or give a deed ; in 1825, after we had moved back to Tuers', he had, the same spring, a settlement with Ryerson, and came into my room one evening, and asked one Chester Abby, then a school teacher there, to go with him to Ryerson's to settle ; Tuers could neither read nor write ; when they came back, they came into the room where I was, and got into conversation about the settlement, and Abby said to Tuers, "I'll tell you, Mr. Tuers, what you ought to have done, you ought to have taken that deed when Mr. Ryerson offered it to you ;" Mr. Ryerson had said to them, while looking over the papers, "here is that deed, what are you going to do with it ;" and Tuers told Abby "that it was not good for anything, what would I do with it ;" I was present at the vendue, and Ryerson was boss, with William Van Voorhis and Lawrence Ackerman ; all the furniture was sold, except one bed ; the bed was reserved for Mr. Tuers ; there was no bed reserved for Mrs. Tuers, I asked him myself ; when Mrs. Tuers and I tried to go into the house that day, Ryerson and his wife, and Ackerman and wife, and Van Voorhis, were in the house, and the door was shut upon us ; I did not see who shut it ; they were lianding out things to sell ; there was a hubbub, more like war than like a vendue ;

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Mrs. Tuers did not get into the house at all that day, but only into the kitchen ; Tuers was not perfectly sober when the sale commenced, and before it was over he sat in the kitchen stiff drunk ; I did not see Tuers do anything at all in managing the sale ; during the first of the sale I went to him, while he was in the door-yard, and asked him to reserve a bed for Mrs. Tuers ; he said he would see about it ; and afterwards, before they came to it, I went to him and asked him again, and he said he would be damned first ; when I spoke to him in the door-yard Ryerson and others were about, but can't say that any of them were present and heard the conversation ; at Mrs. Tuers' request, I also went to Tuers and asked him for a brass kettle that she got of her mother, and he said she should not have it ; it was then sold, and Mrs. Ryerson bought it ; after Mr. Tuers and his wife came together again, he became quite temperate, he became a nice man ; after Mr. Ryerson opened his grog shop, and Tuers began to go there, he began to grow ugly towards me and my husband ; before that he treated me well ; in the year 1825, when we came back, he gave to my husband a deed for a part of his main farm ; from that time to the present my husband and those to whom he sold, have always been in possession of that part ; Frederick Adams is no relation of Mr. Tuers ; his wife is great-niece of Mrs. Tuers ; I am a niece of Mrs. Tuers ; I never knew Tuers' sister Rachel, the wife of Michael Moore, but have often heard him talk of her ; they lived in New York at the time, I believe ; Mrs. Moore is dead ; I knew one son of hers, named Samuel, who lived in the English neighborhood ; I believe he is dead too ; I never knew any other of her children ; I don't know any other children of Rachel Moore, but have often heard she had eight or nine ; I knew Tuers' sister Mary, the wife of Jacob Fredericks ; she is dead, and left three daughters, and one son, named Jacob, now living ; they are said to be all living ; I did not know Tuers' sister Leah, the wife of John King ; she is dead, and left one son, whom I saw at Paterson, after having been to see Mr. Tuers ; this son has died since Tuers' death, leaving one son, now living ; I have seen him within a few weeks, and understand his name is Jacob King.

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Being cross-examined, deponent saith—I never saw Rachel Moore, or any of her family, at Mrs. Tuers', that I know of; I never saw Leah King, nor any of her family, at Tuers'; Mr. Ryerson had a cotton-mill, grist-mill, saw-mill, and part of the time a bark-mill; when we moved away from Tuers' the first time, to the Ponds, we had a farm, and kept tavern; Mr. Tuers used to come to the tavern that we kept; sometimes he got liquor there, sometimes not; sometimes he was drunk there; he was always drunk when he came there; sometimes I refused to give him drink; sometimes I had to give it to him for peace' sake, as I was afraid of him; while Mrs. Tuers was living with us, I saw Mr. Tuers as often as once a fortnight, or once in three weeks; I went with Mrs. Tuers to the vendue; I went to see, like other folks; she wanted me to go with her, and she went there to see if she could not save some of her things that she had brought there from her mother; she did not go there to make a disturbance; she made a good deal of noise at the sale; she got a crying, and cried wonderfully, and she talked, too; don't recollect what she said, nor that she made a good deal of noise, otherwise than by crying; there was a good deal of noise there; more like war than a vendue; I don't know of any disturbance among the others, except what arose from Mrs. Tuers being there; I made no disturbance there; Mr. Ryerson and myself have never been at variance; we have never been intimate; he has always been unfriendly to me, and I treated him the same as he treated me; last Saturday I met him on the Patterson bridge, when he turned his head the other way, and did not speak to me; by Mr. Ryerson's sneaking about the house, I meant he did not come into the house; when he came to see us, he came about the barn and barn-yard, and around openly, so that we could see him; he did not come into the house and house-yard; he does the same now; before that conversation in my room with Mr. Abby, Tuers had always denied to his wife that he had given a deed to Ryerson; this was the first that she knew of it with certainty; she flew into a passion when he said so, and made a great noise about it; this was the spring of the first year after my return, in 1825.

Abraham Lake.—I have known Mr. Tuers, and lived in his

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neighborhood for between thirty and forty years : I am the husband of Margaret Lake, the last witness ; I went to live in Mr. Tuers' family when I was first married, a little over thirty years ago ; I lived there at that time for seven or eight years ; when I first got there, Tuers was quite a peaceable man to live with ; he drank, then, but after a while he got so intemperate that there was no living with him ; when I first got there I cannot say with certainty that Ryerson kept a grocery store for the sale of liquor ; before I left, he did keep a grocery store, and sold liquor ; Tuers was in the habit of going over in the direction of Ryerson's, and I saw him return from that direction ; I cannot say that he got liquor there, but there was no other place in that quarter where he could get it ; sometimes he would bring liquor home with him ; he was not much at home ; he would be home a little while, and then be off again ; he went in the direction of Ryerson's, and came back from that way oftener than any other direction ; that was his general route ; the last part of this time I lived there, Tuers was hardly ever sober ; he was scarcely by his senses any part of that year or two ; after we moved away, and during the separation between Tuers and his wife, I used to see Tuers go backwards and forwards, once in a week, or every two or three weeks—I can't exactly say how often ; I have seen him go past more than once, when he was lying in the back part of Ryerson's wagon, seemingly not able to sit, and Ryerson's wife and daughter on the seat of the wagon ; he appeared to me at those times to be dead-drunk ; during the time I was living at Tuers', he was at Ryerson's quite a good deal ; he was from home a good part of his time ; whether he was at Ryerson's all the time, I can't say, but I have seen him there ; during the time that Tuers and his wife were separated, I don't know that I ever saw him sober ; from my knowledge of his habits before the separation, and from what I saw of him during that time, I should say that, during the separation, he was never in a condition to do business ; I heard of the deed to Ryerson before I got my deed from Tuers ; Tuers conveyed to me a part of his homestead ; my deed was for twenty-one one-hundredths acres, and was given to me about the year 1825 ; as the consideration for this deed, I was to pay \$300 debts for Tuers ; I should say this

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was about the value of the land, or pretty near to it ; I paid this \$300 of debts for him, and have got the receipts for it ; he proposed it to me ; came to me crying, and said that he had about so much debt that must be paid, and if I would come back to live there, and pay it, he would give me a deed for a certain part of his farm ; he did not say that Ryerson was to have paid these debts ; before I got my deed, there was a report in the neighborhood that Ryerson had a deed for the farm ; and, to be sure about it, I went down to the record, and found there was none on record, so I took my deed and came right down and had it recorded ; I got the deed before I moved back to Tuers' ; I meant to be safe about it ; we went back to Tuers', after having been away from there four years ; then I lived with him four years, and moved away again ; I have never lived with him since ; when I first went back there, and when his wife and he got together again, he was not quite so bad ; but after that he got worse again ; the constables came there, and rather than have them come there so often as they did, I paid the money before I was bound to pay it, as I was to have made it off the farm first ; and when Tuers found out that I had nearly paid the debts, he got running to Ryerson's, and became worse again ; I was obliged to leave Tuers' then, on account of his intemperance ; he threatened to burn us all up ; he continued drinking until his leg got injured, when he had to stop it and leave off drinking ; his legs became almost rotten, and when he died they were really rotted off ; it was not five years before his death when his leg was injured, and he stopped drinking ; after I left his house I moved to Paterson, in 1829, when I did not go back there for some time ; after I lived in Paterson, I saw Tuers sometimes come to market there, and sometimes, on such occasions, he was sober, and sometimes he had been drinking ; I have now got possession of the place, under Mrs. Tuers, I believe ; she and I live there, and have possession of the whole of it ; she and I have had the possession ever since Tuers' death.

Being cross-examined, deponent saith—Before I left Tuers' I can't say how long Ryerson had kept liquor at his store for sale ; Mr. Tuers appeared to be pretty near right when I got my deed ; this was at the time when he was in want of money,

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and after all had been taken away from him, and when he was a little better ; it appeared that he knew what he was about when he gave me the deed ; Chester Abby drew the deed, and Abraham Van Cleve took the acknowledgment ; there was, at the same time, an article between Tuers and myself, drawn by Van Cleve ; the article was, that I was to have the deed for a certain part (which deed I got), and I was to pay \$300 debt, and I was to have the whole farm ; and both of our families were to have their living out of it first, and the overplus should go to pay this debt of \$300 ; and when it was paid, the article was to be given up, and the part I had a deed for should be mine ; after this—before I left Tuers' and went to Paterson—he sued me for cutting wood, and I left there ; since Tuers' death, I have been cutting wood on the farm ; I have cut it under the orders of Mrs. Tuers, and took some down, and got tea and sugar with it, under her orders ; I have worked the place on shares for Mrs. Tuers, since her husband's death ; I have seen Mrs. Ryerson and her daughter go past my house in a wagon, with Tuers lying in it, behind : both ways—backwards and forwards from Ryerson's.

Being re-examined in chief, deponent saith—I have sold all the land I bought of Tuers, the same as I bought it ; I had it run out.

[The depositions of Margaret Lake and of Abraham Lake are objected to on the part of the defendants.]

Henry I. Speer.—I live near the Ponds' church, in the township of Franklin, about a mile, or a little over, from where John I. Tuers used to live ; I knew John I. Tuers, Abraham H. Garrison, and John I. Ryerson ; I have heard Abraham H. Garrison speak about a paper he had of John I. Ryerson, but he did not express to me exactly what it was ; I don't know that he did, particularly, state to me his impression as to whether the paper he had was good or not ; he told me either that the paper was in the hands of Garret Van Dien, or at Hackensack, if I recollect right, and said that he did not mean to bother himself about it, or something to that effect—that he was getting old ; I was one of the appraisers who appraised Mr. Garrison's effects after his death ; there was no mortgage, or deed in the nature of a mort-

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gage, to my knowledge, produced to the appraisers by his executors, to be appraised; the notes of John I. Ryerson were produced, and appraised as notes simply; I can't say whether the notes had seals to them; I know the Tuers farm; can't say what its value is; don't recollect the number of acres in it; the farm is a rough kind of an establishment; I would not undertake to affix a value to it; I knew John I. Tuers about the time he was separated from his wife; I knew him from about the year 1820 to his death; for a year or two—perhaps a little more—before his death, he was a little reformed as to temperance, but before that, he was a miserable wretch; I mean he was a miserable drunkard; I kept a public house for several years, and my sons have kept it since; I have always resided in the same house there; I can't say that I ever knew a more miserable, besotted drunkard than John I. Tuers was; if he got out where there was liquor, he was not apt to keep sober; I suppose that, before he reformed a little, in his latter days, he was in the front rank as to drunkenness; this continued until within a few years of his death; after that, he came frequently to my house, after groceries and the like, and he said he did not dare to drink, on account of his sore leg; when in liquor, he was pretty roaring; liquor always appeared to make him kind of crazy; not oftentimes when I saw him, during the first ten years and more, down to 1835, that I knew him, was he in a fit condition to give a deed for his property.

Being cross-examined, deponent saith—When I saw him, it was, principally, from home; I have seen Tuers at his own house, too, but can't say that I have been there often—once, twice, or oftener; can't say how often; when I saw him at his own house, I don't distinctly recollect how he was, as to liquor; from my own knowledge, I don't know how he was at home—whether temperate or not—but have seen him at his house when he was drinking hard cider; I was not present when he made his will, and don't know how he was then.

• Rachel Blauvelt.—I am a daughter of Judge Martin Van Houten, senior; I was born and brought up at the Ponds, and lived there till a few years ago; I knew John I. Tuers well, in his lifetime—knew him at and before his separation from his

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wife; during that separation I was at the auction held at his house; I myself bought one article there; I did not hear the articles of sale read, but understood that the money was to be paid to John I. Ryerson; I heard it so said by those in the house; Ryerson kept the sales book a part of the time; by all appearances, he was one of the managers of the sale; I did not myself pay for the article bought by me; my father paid for me; Mrs. Tuers came there; I heard Mr. Ryerson say that she should not be allowed to come into the house, and that her bid should not be taken; I recollect the expression he made; it was, "that they must not allow the old dunder to come into the house; that they must take her and put her outside the gate;" she did not bid for nor buy anything there; I considered that Tuers was quite still in the afternoon; he was not very noisy that day that I recollect; I can't say that I heard Tuers say that his wife should not come in nor bid; towards night he (Tuers) came into the kitchen where I and another woman were sitting; there were two ladles there and he took them up and gave us each one of them; the other woman asked him whether he had the liberty to give them away; he said he would take that liberty, so we each took a ladle home; I don't recollect that Tuers took any interest or active part in the sale; besides Ryerson, Lawrence J. Ackerman handed things out of the house; he and his wife were in the house; during that time of the separation, I never saw Tuers that he was right sober, until within a few years before his death; from that time I can't say that I ever saw him sober; I have seen him frequently at his home, and have seen my father fetch him from home, for fear that he would set his house on fire; my father's house from Tuers' was about half a mile, across lots; by the road, about a mile; when we went afoot to Tuers', we went across lots; the 26th day of May last, I was forty-five years old; I lived at the Ponds until January, 1845; one day Tuers came to my father's house, after he was living with his wife again, and my father told him that he had been to Ryerson, and spoke to him about the business, which was, that Tuers owed my father some money for business done by my father for him, and Mr. Tuers said he was going to settle his own business; that Ryerson had.

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nothing to do with his (Tuers') business.

Being cross-examined, deponent saith—At the vendue I think Ryerson did not write all the time; sometimes he was around; we could not tell who wrote all the time, as the book was kept in the house; only very few were allowed to go in the house; about half a dozen were in the house the greater part of the time; the things were handed over the lower door, and sold out of doors.

Being re-examined-in-chief, says—Mr. Ryerson and his wife, Lawrence J. Ackerman and his wife, and William Van Voorhis were in the house; Tuers was around, in and out.

Being again cross-examined, says—My father's claim was about fifty dollars; Tuers came that day to pay the interest; he paid it that day; he handed my father a three-dollar bill.

Isaac J. Storms.—I know that John I. Ryerson got a black horse of John I. Tuers, some eight or ten years before his death, perhaps more; Ryerson's son had him as his riding horse, and the son told me that they were to give ninety dollars for him.

Being cross-examined, deponent saith—Mr. Ryerson's son's name that rode the black horse was George; it was after the separation between Tuers and his wife, if my memory serves me right; I can't state the year nor month; George did not say that *he* had bought the horse, but that it was bought for his riding horse; I don't know anything about the purchase, except from hearsay.

[Defendant objects to what the son said to witness.]

Being re-examined-in-chief, says—I knew the horse first as belonging to Tuers, and afterwards to Ryerson; George, at the time, was living with his father, and was supported by him.

William H. Winters.—I bought things at the vendue held at Mr. Tuers' during the separation between him and his wife; I bought some small articles there; I paid John I. Ryerson for what I bought there; the articles of the sale had been read before I got at the vendue, but it was said there that the money was to be paid to Mr. Ryerson; I cannot read; when I went to settle with him for the articles that I had bought at the vendue, and told him what I came for, he looked over a book that I

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supposed to be a vendue-book, and found my name; I asked him to look over the vendue-book of Mr. Tuers—that I wanted to pay him—and he got the book; I knew Abraham H. Garrison well, in his lifetime; he often told me that John I. Ryerson had offered to give him a mortgage deed upon the property he had of Tuers, but that he (Garrison) had told Ryerson he would not take it; that all he wanted was to have as good money as he had let him have; that the property was not Ryerson's, and he would not give him two dollars for it; he told me that he had seen Ryerson, and wanted to buy of him a place to put a fulling-mill on; that Ryerson would not sell it to him, and that he (Garrison) did not want to be bothered with the place of Tuers; I heard Garrison talk in this way several times; I heard him talk about this shortly before his death; the last time I heard him talk about this, was within a year or six months before his death; this had been going on for some time; after Ryerson had returned from Georgia, he and his wife were on a visit to Garrison's; I was there, also, but did not hear anything said about it then; the next time I saw Mr. Garrison, he told me about this over again; I heard Garrison say that the deed to Ryerson was good for nothing; that the property did not belong to him, and he (Garrison) would not go to law about other people's property, and would not throw good money after bad.

Being re-examined, deponent saith—This conversation with Garrison was after Ryerson's visit to him; I cannot say if it was after Ryerson had been the last time to Georgia, or not.

Margaret Lake.—I have seen Garret Van Dien, and had a conversation with him about this lease since Mr. Tuers' death; I met Van Dien in Paterson, and we got into conversation about the place; we had often before been in conversation about it; I said to Van Dien, "I have always understood from you that you wrote the deed, and the executors tell me that Johnson wrote it;" he said, "No, but the lease;" I asked him, then, what the lease was about; he answered that the old man had come to him, and was alarmed about it, and asked what he (himself) had been doing—that he was afraid he had put himself on the road; the old man had asked him, then, if there was nothing for him to do; that he (Van Dien) had told him he guessed there

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was, and that then Ryerson had turned round and given him the lease.

[Witness desires to correct her statement upon her former cross-examination, in this—that John I. Ryerson had no carding nor cotton-mill at the time of the separation between Tuers and his wife. They were erected afterwards.]

Leah Moore.—I now live in the English neighborhood ; I lived at the Ponds, in the war ; I knew John I. Tuers and his sisters ; I knew Leah, the wife of John King ; she is dead, and left but one child, Benjamin King ; he is dead, and left but one child, named Jacob King ; I knew Rachel, the wife of Michael Moore ; Rachel Moore is dead, and Charity Dealing is the only child she has left ; I knew his sister Mary, the wife of Jacob Fredericks ; I have heard she is dead ; she left four children, Jacob and his three sisters—Margaret, who was married to John O'Neill ; Mary, who was married, as I have heard, to James Pilgrim, and Charity, who was married, as I have heard, to Jonathan Wilkes.

Testimony for defendants.

Garret Van Dien.—I live in the township of Franklin ; was formerly sheriff of the county of Bergen ; I have, for many years, been a surveyor, also, and, for some years back, have been in the custom of drawing papers for people, such as deeds, mortgages, leases, &c. ; sometimes people apply to me for advice in relation to their affairs ; I was acquainted with John I. Tuers in his lifetime ; have seen him several times ; he came to me for advice in relation to his affairs, in the year 1831 ; he came alone to my house ; he told me he had conveyed his property to John I. Ryerson, and that he had heard Ryerson was going to fail, and that he would be turned on the road, and have no means to support himself, and wanted my advice as to what would be best for him to do ; I told him the better way for him would be to lease the property for life, if Ryerson would agree to it ; then I asked him if he had given the deed to Ryerson ; he said yes ; I then asked him what he paid for it, and he said that Ryerson was to pay all his debts ; that he had had money from

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Ryerson several times, and had boarded there; that Ryerson was also to pay \$100 that he owed Albert Van Voorhis; this was principally the whole of what passed then; I told him he had better go home and bring Ryerson down with him, if Ryerson would agree to it; a few days afterwards, Ryerson and Tuers came down together to my house and talked over the matter, and Ryerson agreed that he should have it for life, with the exception of the timber that he wanted, to build, &c., he should cut when he wished; there was a rent of \$18 reserved; this was to make it binding; I told them there ought to be inserted some sum to make it binding, and they told me to put any sum, and I told them that \$17 or \$18 would be sufficient; they then agreed fully upon the terms; I was to draw it, and Ryerson was to come down and sign it; Tuers and Ryerson wanted me to keep it in my possession; I drew the paper after they had left; Ryerson came down and signed it; it was drawn in conformity with their agreement; it was agreed that Ryerson was to come down and sign the paper, and I was to keep it; within a few days after, Ryerson came down and signed the paper, and he at the same time gave me the deed from Tuers to him, to have it recorded; I took the deed down to Hackensack, and left it in the office; shortly after this I met Mr. Tuers on the road, and he asked me whether Ryerson had signed the lease; I told him he had; he asked me if I was paid for it, and I told him that Ryerson had paid me for it; he asked me whether I had the lease, and told me I must keep it; in this business I acted for Mr. Tuers; when he first came alone to consult me, he asked me not to tell Ryerson that he had been to me for advice; I have never to this day told Ryerson that Tuers had been to me for advice; I never knew that a deed had been given by Tuers to Ryerson, until Tuers came to me and asked advice about it; I never had any conversation with Ryerson about it, until they came together to me; I live about eight miles from Tuers' house.

[A paper writing purporting to be a lease from John I. Ryerson to John Tuers, dated August 20th, 1831, being shown to deponent, he says]—It is in my handwriting, and I signed it as a subscribing witness; it was signed and sealed by John I. Ryerson,

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in my presence, three or four days after the time it bears date. [Which paper is offered in evidence and marked Exhibit D 1 on the part of the defendants.]

[A paper purporting to be a deed from John I. Tuers to John I. Ryerson, dated May 1st, 1823, duly acknowledged and recorded, being produced, is offered in evidence and marked Exhibit D 2 on the part of the defendants. The deed being shown to deponent, he says]—This is the deed I took to the clerk's office to be recorded ; I knew Josiah Johnson, the commissioner who took the acknowledgment of this deed ; he is dead ; and I know his handwriting ; I have known John I. Tuers for forty odd years ; I saw him, but not very often, from the year 1820 to the year 1835 ; when he got out in company he would have a drunken frolic sometimes for a fortnight ; he would run out when he got in a frolic ; about eighteen years ago I was assessor for Franklin township ; when he first came to me to consult me, he was as sober as a judge ; when he came to me with Ryerson he was sober ; from the way that he talked at those times, I considered him perfectly competent to take care of his own business ; at both those times he was not in the least disguised with liquor ; he was generally drunk at election times ; when he was with me, I thought he was a man who was taking care of his own business, or else he would not have come for advice to take care of his life estate in the property ; I was one of the appraisers of the estate of Abraham H. Garrison, deceased.

[A paper purporting to be a sealed bill given by John I. Ryerson to Abraham H. Garrison, dated May 1st, 1834, for \$991, with interest, being produced and marked Exhibit D 3 on the part of the executors of Abraham H. Garrison, deceased ; also a paper purporting to be a note given by John I. Ryerson to Abraham Garrison, dated January 20th, 1837, for \$50, being produced and marked Exhibit D 4 on the part of the executors of Abraham H. Garrison, deceased, and said papers being shown to deponent, he says]—They were both produced to the appraisers of Garrison's estate, and were inventoried by us ; I know the signatures to both to be the handwriting of John I. Ryerson.

[The paper marked Exhibit D 1 on the part of the defendant, being shown to deponent, he says]—This is the lease that I

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took from John I. Ryerson for Mr. Tuers, as before stated.

Being cross-examined, deponent says—When Mr. Tuers first came to consult me, I had never heard of the deed from Tuers to Ryerson ; Tuers told me he had given Ryerson a deed for his farm ; he did not tell me when it had been given ; did not state to me that it was given while he was separated from his wife ; he did not state anything to me about the object for which he gave the deed ; he told me that the deed would turn him on the road ; he asked me what course he must take to keep his life estate in it, and I told him he must take a lease for life ; he did not, when I told him the effect of the deed, use the expression, or anything like it—“ My God ! what have I done ? I have put myself upon the road ; ” he told me he had given Ryerson a deed for his farm, and having heard he was going to fail, was afraid his creditors would take hold of it and turn him (Tuers) upon the road, and he asked me what he must do, and I told him to get a life estate from Ryerson, if he would do it ; Tuers had not the deed with him ; I never saw it until it was handed to me to get it recorded ; Tuers never consulted with me as to whether the deed was a good deed ; he told me Johnson had drawn it, and taken the acknowledgment ; Tuers did not see the lease, nor hear it read, after it was drawn ; Tuers had no other object in consulting me, excepting to know how he might avoid being turned out upon the road ; he said nothing about a life estate ; that first came from me—I advised it ; neither when Tuers came alone, nor when he and Ryerson came together to me, did they bring the deed ; Ryerson brought it when he came and signed the lease ; I don't recollect having done any business for John I. Ryerson before that time ; Tuers came to me the first time on horseback ; the second time, I don't recollect whether he came with Ryerson in the wagon, or whether they both came on horseback ; I don't recollect whether or not John I. Ryerson failed at that time, but there was a good deal of talk about it ; always since that time, Ryerson has been considered in insolvent circumstances, or pretty hard run ; there has been a talk with the neighbors that he had it pretty tough to get along ; there was a little report of this kind at the time the lease was given, but not much ; some years afterwards there was a considerable

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talk of this kind ; between the year 1821 and the date of the lease, I had seen Tuers several times—perhaps a dozen times ; saw him both drunk and sober within that period ; I am the subscribing witness to the deed from Ryerson to Garrison, the same being an exhibit now offered on the part of the executors of Abraham H. Garrison, deceased, and marked Exhibit D 5, on the part of defendants. [The same being shown to deponent, he says]—I don't recollect whether it was executed at my house, nor who was present at the time ; Garrison was not present at the execution ; Ryerson directed me to draw it ; he directed me to draw a deed ; at the time of its execution it was understood to be a deed ; it was drawn and executed as a deed, and not as a mortgage ; Ryerson had a wife ; I don't recollect if she was present at its execution ; Ellen Ryerson, the other subscribing witness, is the daughter of John I. Ryerson, but I can't tell from this whether it was signed at his house, or whether she was with him at my house ; I believe Ryerson took the deed with him when it was executed, all acknowledged just as it now is ; I have no interest in the result of this suit ; Ryerson don't owe me, nor the estate from which my wife or I expect to get property, one cent ; I have not taken an active part in assisting Ryerson to prosecute his claim to this property ; I went with him to counsel, I did not employ any ; I went with him only to show what papers I had ; I had the deed to Garrison, the lease to Tuers, and I think I had the deed to Ryerson ; I took the deed to Ryerson to the clerk's office, and got it from the office when recorded ; don't know that I had held the deed to Ryerson from that time, or had returned it to Ryerson ; I went to employ counsel for Garrison, at his request, but not for Ryerson.

Being re-examined-in-chief, deponent saith—When Ryerson and Tuers were together to see me, I marked down in writing the terms of their agreement, and from this memorandum I drew the lease ; when I put down the terms in writing, I stated them to Ryerson and Tuers, but don't recollect of reading it over to them after I had taken them down.

John I. Ryerson, Jr.—I reside in Manchester, in this county ; I am the son of John I. Ryerson ; I knew John I. Tuers ; I lent him money at different times, and took his notes for it ;

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[Three papers being shown to deponent, purporting to be notes of hand given by John I. Tuers to deponent, he says]—They are all signed by John I. Tuers ; I don't recollect whether I wrote the notes, but I believe them to be in my handwriting ; Mr. Ryerson, my father, paid me the money for the notes ; I think that my father paid me either \$170 or \$270 ; besides these three notes, there must be another note of \$50 somewhere ; that money I got of John I. Garrison, and lent it to Tuers ; and that, with these notes, would make \$170 ; I recollect of Tuers getting a black mare of my father ; she was a good one ; worth \$85, or more—call it \$85 ; I don't know that Tuers got store goods particularly, but he got flour, and grain for seed ; I understood that he got what he wanted ; the money for the notes was paid me by John I. Ryerson after the deed was given ; this money Tuers got of me after the deed was first left with my father ; and after I understood that he had taken the property, he paid me these notes.

[The three notes above mentioned are offered in evidence on the part of John I. Ryerson, and marked Exhibits D 6, D 7, and D 8 on part of the defendants.]

I think that I received either \$170 or \$270 ; am certain it was one or the other.

Being cross-examined, deponent saith—I can't say how long I laid out of this money ; I don't recollect that my father ever got a black horse from Tuers ; I never did ; I am about forty-two years old ; when I lent Tuers this money I was carding and fulling for country people, in a mill I hired of my father ; I recollect of Tuers being parted from his wife ; I don't recollect whether or not he stayed or boarded at my father's house a part of that time ; I never heard my father say that he collected the vendue book ; I have seen Tuers both drunk and sober ; John S. Forshee is a son-in-law of my father's ; he has been married to my sister about twenty years ; I am not sure as to the time ; he was married before I was, which is seventeen years ago ; cannot tell whether he had any children before my marriage.

John S. Forshee—[Objected to on the part of the complainants.]—In the year 1831 I went to Tuers' place, to work for him ;

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I worked part of the place for him on shares, and at different times made shoes for him, and did some day's work for him ; when I went there, he offered to give me a lease for seven or eight acres ; he gave me the lease, and I built a small house upon the land ; I worked off and on for him eight or ten years or more ; after I got my lease, I heard Tuers, at different times, talk about the deed given by him to Ryerson, and about the lease given by Ryerson to him ; after he got the lease, he came to me and told me that Ryerson had fixed some paper with him ; I don't know what it was, not having seen it ; he told me it was fixed just as he wanted it, that he had it now as he wanted ; he told me that Ryerson had given him a lease for his life ; that it was fixed as he wanted it ; he has had conversations to this effect several times with me ; he has, at different times, told me who was to pay his debts ; he has told me about this \$170 that Ryerson had paid to his son John for him ; he has told me this at different times ; I remember the horse that George had of Tuers ; I had conversation with Tuers the day it was born, and he said, there is a colt for George ; that he had promised him one ; after George had him, Tuers told me that he had given the colt to George ; that he had had him long enough, and George might take care of it himself ; he said he had given it to George ; after Tuers had the lease, he came to me and said, " Now I have fixed it right with the old man, and you must go to him, and he must give you a deed for the land ;" by the old man he meant Mr. Ryerson, and it was for the lands that I had a lease for ; my lease was dated March 12th, 1831 ; I then went to Mr. Ryerson, and told him what Tuers had said, and Ryerson said he would give me a deed, and sent it to me.

[A deed being shown to deponent, he says]—This is the deed.

[The same is offered in evidence and marked Exhibit D 9 on the part of the defendants]—At the time I went to Tuers', in 1831, and for some years afterwards, I considered Tuers a sober man ; he would take a glass sometimes, but I have known him more than once to refuse it ; he has refused to drink with me, and said he was afraid to drink on account of his sore leg ; I like a glass sometimes, and I always asked him to drink if he was present ; his leg was sore when I went there ; called an old

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sore then ; I had understood that years before that he had been a hard drinking man, and I had in fact seen him drunk ; when Tuers was sober, I thought he was about as capable of doing business as any other man without learning ; Ryerson gave up his store and selling liquor as much as twenty years ago ; he did not sell liquor nor keep store, to my knowledge, in 1831 ; I am married to a daughter of Mr. Ryerson ; I married her in August, 1825 ; the lease from Tuers to me is for fifty years.

Being cross-examined, deponent says—I now hold the seven or eight acres under the deed from Ryerson, and it is a part of the Tuers farm ; I don't consider that I have an interest in the event of this suit ; I suppose that if this deed to my father-in-law is set aside, my deed will have to go too ; I have taken no interest in the defending of this suit, nor got any witnesses ; I have stopped people by the way, and asked them what they knew about it ; I have, in the progress of this examination, constantly consulted with Mr. Pennington, the defendants' counsel, and directed him what questions to put to the witnesses ; it is not understood between me and Ryerson that, if he keeps the place, my wife or myself were to have the Tuers place, only what I now hold under my deed ; never thought of such a thing, except I could buy it ; my lease from Tuers is about yet somewhere ; the rent was ten dollars ; I never lived in the house with Tuers ; never lived on his place, except the part I built on ; I worked it for Tuers on shares, two, three or four different years, but not successively ; I never worked the whole of the farm of Tuers on shares, except perhaps, one year ; he generally kept a potato patch and garden for himself ; I have torn down the house that I built upon the seven or eight acres ; part of it I have taken off, and parts are yet left on it ; I tore it down not over six or seven years ago, before Tuers' death ; when I tore it down, I don't think that I told any person that I did so because my title to the place was not good ; I always considered my title good enough ; my barn and hovel are yet on the land ; I built the house in the year 1831, the same spring I got the lease.

[The complainants produce and offer a deed from John I. Tuers and wife to Abraham Lake, duly acknowledged and record-

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ed, which is marked Exhibit C 3 on the part of the complainants.]

Albert N. Van Voorhis.—[Being shown a paper purporting to be a bond executed by John I. Tuers to Baltye Demarest, in the penal sum of £80 current money of the State of New York, conditioned for the payment of one hundred Spanish milled dollars, and bearing date the 19th day of June, A. D. 1822, and assigned by Peter Cole, the husband of the said Baltye Demarest, to the said Albert N. Van Voorhis, which said bond is marked Exhibit A on the part of the defendants, deposeth and saith]—That John I. Ryerson has made payments to him since the 20th of August, A. D. 1831, on said bond; thinks he made payments at two different times, and paid deponent six dollars at each time; deponent is now seventy-nine years old; as far as deponent can remember he has received payments of interest on said bond since August 20th, 1831, from one Van Houten, who was the executor of John I. Tuers.

Cross-examined on the part of the complainants—Deponent believes John I. Ryerson said, when he made the payments of interest, he paid it for Tuers; I don't recollect Ryerson ever saying it was his debt, or that he was bound to pay it; I should know Ryerson if I were to see him now; I first became acquainted with him when he paid the interest to me on the bond.

A. O. Zabriskie, for complainants. He cited 16 *John. Rep.* 47, 515; *Saxton* 689, 346, 353, 110, 244–5; 1 *Green's Ch.* 374; 16 *Ves.* 512; 3 *Ves. & Beam* 117; 10 *Eng. Cond. Ch. Rep.* 406; 1 *Ves. & Beam* 195; 13 *Eng. Cond. Ch. Rep.* 192.

A. S. Pennington, for defendants. He cited *Saxton's Ch.* 320; 1 *Fonbl. Eq.* 144; 1 *Greenl. Evid.*, §§ 109, 147; *Saxton* 458; 4 *Halst. Rep.* 153; 2 *Greenl. Evid.* 297.

THE CHANCELLOR. The answer of Ryerson admits that he did not accept the deed from Tuers to him when it was left with him, in 1823; he says that Tuers desired him to accept a deed and pay his debts; that he did not at first consent to it; that

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Tuers, thereupon, without his knowledge or consent, procured a deed to be made to him, and acknowledged it, and brought it to him, and delivered it to him, and insisted on his putting it on record, and went away, leaving the deed in his hands; that the deed remained in his hands until August 20th, 1831, when Tuers came to him and insisted that he should accept the deed and pay his debts. This shows that the deed was inoperative up to August 20th, 1831, more than eight years after it was left with Ryerson.

To estimate, rightly, the transaction of August 20th, 1831, the testimony as to the habits of Tuers, and his capacity to make a deed at the date of the deed, and from that time onward, and to a period subsequent to August, 1831, must be taken into consideration.

The testimony shows such a state of mental and physical imbecility in Tuers—the result of excessive and long-continued intemperance—that a deed from him, without consideration, to a man who, from day to day, ministered to his passion for strong drink, if it had been accepted by Ryerson, would, I think, at this day, be declared void. Ryerson's own conduct in reference to the deed, shows a consciousness on his part, that it could not be considered a valid deed. This consideration has great influence in our examination of the transaction of August, 1831, That transaction was based by Ryerson and Van Dien on the instrument purporting to be a deed made in 1823.

The deed being admitted by Ryerson to be inoperative, up to August, 1831, the allegations of the answer on which Ryerson claims that the deed then became valid, must be proved. The proof does not sustain the answer. On the contrary, the testimony in relation to the transaction of August, 1831, compared with the answer, and the nature of the writing then given by Ryerson—called, in the answer, a lease for life—and the fact stated by the witness Van Dien, that that writing was not seen by or read to Tuers, throw too much suspicion on that transaction to permit the court to say, from anything which took place, that any such assent was given by Tuers to this last arrangement as would give life and effect to the writing purporting to be a deed made in 1823.

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I am willing to order a reference, for the purpose of ascertaining how much Ryerson has paid, and when, and how much he received from the sale of the goods at the vendue, or otherwise, from Tuers, reserving the question whether he shall have a lien on the lands for what he may be found to have paid.

Decree for complainants.

AFFIRMED, 2 Hal. Ch. 618.

**JOHN D. HAGER v. EDWIN A. STEVENS, JAMES NEILSON,
AND OTHERS.**

1. One stockholder of an incorporated company filed a bill against three other stockholders of the same company, praying an account of all the property bought by them, or either of them, with the money of the company, and of the rents and profits thereof, and all moneys received from the business of the company, and expended in the purchase of property; and that they may account for all breaches of trust as directors, agents, or trustees of the company, and make good all losses incurred thereby; and may account for all moneys made by them, or either of them, by the purchase or sale of any property by the company; and may be decreed to pay to the complainant his proportionate share of what may be found due, and of all surplus moneys in the hands of them, or either of them, not required for the business of the company, or to pay the same to a receiver; and that all the property not necessary for the objects of the company may be sold, and the proceeds divided among the stockholders, or paid to a receiver; and that a receiver be appointed of the rents and profits of the real estate at Camden, purchased with the funds of the company, and of all other property purchased by them, or either of them, with the funds of the company, without the consent of the company, and not necessary for the objects of the company; and that they may be restrained, by injunction, from selling any real estate purchased with the funds of the company, and from selling any other property of the company, without the consent of the stockholders, and from managing and controlling the affairs of the company at their will and pleasure, and without the consent of a lawfully-constituted board of directors.

2. An injunction was allowed, pursuant to the prayer of the bill.

3. A supplemental bill was afterwards filed, stating other facts, and making other persons defendants, and praying the same relief against them; and praying that they and the defendants in the original bill may be restrained, by injunction, from disposing of any of the property of the company, and from winding up the concerns of the company, or causing the company to go into liquidation, without the consent of the stockholders.

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4. An injunction was also allowed on this bill, pursuant to the prayer thereof.

5. A motion was afterwards made for the appointment of a receiver, to take charge of certain real estate in Pennsylvania, alleged by the bill to have been purchased with the funds of the company, the legal title to which was in another person, and of certain moneys, alleged in the bill to be the funds of the company, in the hands of one of the defendants, the use of which the bill alleges he has improperly obtained, and as to which the answer says it was loaned to him by the board of directors.

6. The motion was denied.

7. Where real estate in another state has been in the use of a corporation of this state a number of years, and the situation of it in reference to the legal title has been the same during the time, and the company are in no more danger, in reference to the title, than they have been during the time, and no danger is alleged as to the responsibility of the person in whom the legal title is, a receiver to take charge of it, will not be appointed on the application of one who has been a stockholder of the corporation during all the time.

8. Receiver will not be appointed, on a bill filed by one stockholder of a company against a director of the company, to take charge of moneys alleged to have been improperly received and retained by the said director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors.

9. The Chancellor intimated that if a large accumulation of property by a corporation should appear to be the result of a fraud on the rights of others not parties to the suit, the court would not become the instrument to distribute the moneys accumulated by such fraud, on the application of one who had been a stockholder of the company from the beginning, and cognizant of the fraudulent proceedings which resulted in such accumulation.

The bill in this case, filed March 26th, 1847, by John D. Hager, for himself and in behalf of all other stockholders of "The New Brunswick Steamboat and Canal Transportation Company" who shall come in, &c., states that the company was incorporated on the 18th of January, 1831; the capital to be employed for the establishment of a steamboat or boats, a canal boat or boats, to ply on the Delaware river from Philadelphia to Trenton, and from New York to New Brunswick, on the Raritan river, or their waters, and on the waters of any canal that should thereafter be completed, connecting the said rivers, with power to purchase, hold and convey any lands necessary for the objects of the corporation, with the privilege of taking up or landing passengers, merchandise or other goods and chattels at any intermediate point or points; a share of stock to be \$500, and the shares not to exceed 200; the capital not to be employed for any purpose not expressly authorized by the act of incorporation; when

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50 shares should be subscribed, a meeting of the stockholders might be called at New Brunswick, on three weeks' notice in the newspapers printed in that city; and that the stockholders assembled should choose, by ballot, from among the stockholders, five directors for one year thereafter, as follows; for every share and not exceeding four, one vote; a majority of the directors to be residents of and their office to be kept in this state; and in case of a vacancy in the office of a director, by any means, the remaining directors shall supply the same; the director so chosen to be considered in all respects as if elected by the stockholders. That books of subscription to the stock were opened on the 1st of February, 1831, when the whole number of shares was subscribed by the following persons: James Bishop, 16 shares; Isaac Fisher, 25 shares; Isaac Fisher for others, 72 shares; Richmond & Hatfield, 8 shares; C. & J. R. Dunham, 8 shares; Lawrence Fisher, 25 shares; Miles C. Smith, 16 shares; John D. Hager, the complainant, 30 shares; and that \$125 was paid in on each share at time of subscription, making \$25,000.

That the company was organized and carried on the business of transporting passengers and merchandise between the cities of New Brunswick and New York, with their steamboat Napoleon.

That at the time, Edwin A. Stevens, James Neilson and others were interested in a line of steamboats which also plied between New Brunswick and New York for the transportation of passengers and merchandise and other freight.

That on or about May 1st, 1831, Neilson commenced a negotiation with the directors of this company, or some of them, for the purpose of obtaining the control of this company, which negotiation was subsequently concluded by said E. A. Stevens; and that the directors and stockholders of this company transferred to Stevens and Neilson, or to such persons as they directed, more than half of the shares of stock subscribed as aforesaid; and that the said stockholders, in pursuance of said arrangement, on the 16th of May, 1831, elected the said Stevens and Neilson, and their friend and associate, George Abbe, (with whom they were concerned or interested in the transportation of goods and merchandise between New York and Philadelphia,) as

directors, in the room and stead of James Bishop, Charles Dunham, and Frederick Richmond; and the said stockholders did also, at the said meeting, elect Miles C. Smith and Isaac Fisher directors.

That, so far as the complainant is informed and believes, the principal, if not the only inducement which operated on the stockholders to dispose of a majority of their stock to said Stevens and Neilson and their associates, and to give up the control of the company to them was, either a threat or intimation of Stevens, or a well-grounded apprehension, that if they did not accede to his request, he would break them down, by reducing the fare in the steamboats then running between New Brunswick and New York so low that the company must be broken down.

That, after Stevens, Neilson, and Abbe were appointed directors, there was but one meeting of the board of directors in 1831, which took place on the 29th of October of that year, at which meeting a dividend was declared of \$25 on each share of stock.

That, on the 15th of February, 1833, at a meeting of the directors, at which Stevens, Neilson, Smith, and Fisher were present, a dividend was declared on the earnings of the Napoleon and of the sloop James Bennet, of \$55 on each share, which was paid to the stockholders.

That, at a meeting of the stockholders on the 17th May, 1834, a proposition was made by Stevens to associate David S. Hill, Benjamin Fish, George J. Abbe (who at that time were concerned in the Union Transportation Line) and others in this company, and that they should be allowed to hold the balance of the capital stock not yet paid in, or such proportion of it as might be agreed on by Stevens, to enable him to associate the said Hill, Fish, Abbe, and others in the company. That the stockholders agreed to the said proposal, and thereupon agreed each to surrender his proportionate number of shares, and the following stockholders, namely, Smith, J. Neilson, Stevens, Hatfield, A. S. Neilson, Fish, Fred. Richmond, Hager, Hoagland, Bishop, and George Richmond signed an agreement in writing to surrender their proportionate number of shares.

That, at a meeting of the stockholders at New Brunswick, on the 5th of December, 1835, E. A. Stevens made a report to the

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said stockholders, that he had agreed with Hill, Fish, and Abbe and others, to become associate owners in this company to the amount of 100 shares of the stock, and, thereupon, the said stockholders signed a recommendation to the stockholders to comply with the said arrangement, by transferring half of their respective shares to E. A. Stevens, as attorney for said persons. This recommendation was signed by E. A. Stevens, Smith, J. Neilson, Bishop, I. Fisher, A. S. Neilson, Hager, Hatfield, G. Richmond, and L. Fisher.

That, under said agreement, Stevens did not associate a single individual, or transfer a single share to any person who was not either a director or stockholder in the Camden and Amboy Railroad and Transportation Co., or in the Delaware and Raritan Canal Co., or in the employ of said companies, or one of them, or interested in the Union Line, or Union Transportation Line; and that all others were designedly excluded by Stevens, and for the purpose, as the complainant charges, of so managing the affairs and business of the said Camden and Amboy Railroad and Transportation Co., and Delaware and Raritan Canal Co., as to make the business of transporting goods, &c., on the said railroad and canal to enure to the benefit of the holders of the stock of the said "The New Brunswick Steamboat and Canal Transportation Co.," and to prevent persons not connected with said railroad and canal co. from knowing or obtaining any information of the business of the New Brunswick Steamboat and Canal Transportation Co. And, as evidence of such design and intention, the complainant states, that A. Decker, who was brought into this New Brunswick company as a stockholder, was the agent of the Union Transportation Line in the city of New York; that Philip Kipp, brought in by Stevens as a stockholder, was an engineer in the employ of the Camden and Amboy Co., and that William Cook, so brought in, was an engineer on said road; and that William J. Wilson, J. H. Dallas, James Lefevere, A. Jenkins, and M. C. Jenkins, so brought in as stockholders in this company by Stevens, were the proprietors of the Union line, under the control and direction of Stevens and his associates; and that Fish and Abbe, also so brought in as stockholders, were proprietors of the Union Transportation Line be-

tween New York and Philadelphia, and that William Gubrick, also brought in, was a proprietor in what was called the Citizens' Line, which, at one time, ran a line of steamboats and stages in opposition to the Union Line, and had, about the time of this negotiation of Stevens for the control of the stock of this company, ceased its opposition and entered into some arrangement with, or become merged in, the Union Line, or somehow interested in the same.

That on the 13th October, 1834, the board of directors of the Camden and Amboy Railroad and Transportation Co., at a meeting held at Bordentown, passed the following resolution: "*Resolved*, That E. A. Stevens be authorized to consummate an arrangement with the New Brunswick Steamboat and Canal Transportation Co., for the transportation of merchandise over the Camden and Amboy Railroad, on the following terms, viz.: the said company to pay to the Camden and Amboy Railroad Co. eight cents per ton per mile for tolls, locomotive power and cars, upon all merchandise passing across the road; and to charter to said New Brunswick Co. the steamboat Thistle, at \$2.76 per ton for the freight she may carry between South Amboy and New York. The said New Brunswick Co. also agree to convey, and be at the whole expense of conveying, the mail between Philadelphia and New York, and to pay the Camden and Amboy Railroad Co. \$8000 per annum, the Railroad Co. furnishing the locomotive, cars and steamboats on the Delaware necessary for transporting the mail and passengers between Philadelphia and South Amboy; and also agree to pay to the Camden and Amboy Railroad Co. \$3 for each passenger conveyed in the mail cars across the road; all way passengers in proportion; the boat to be insured by the charter-party. The above resolution, as it respects the mail, is subject to the concurrence of the contractors and the Post Office Department; should they not agree to transfer the contract to the New Brunswick Co., then the said New Brunswick Company agree to convey the mail from South Amboy to New York for \$8000 per year;" that the said resolution of the Camden and Amboy Railroad Co., though passed October 13th, 1834, was not communicated to the board of directors of the New Brunswick Co. until March 23d, 1835, when it was com-

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municated to said board by presenting a letter from James Neilson to E. A. Stevens, dated as aforesaid, containing a copy of the same, which said resolution was, at the request of Stevens, entered in the minutes of the New Brunswick Co.

That, on the 25th of August, 1835, at a meeting of the board of directors of the New Brunswick Co., at which Smith, James Neilson, E. A. Stevens, Abbe and Fisher were present, one Henry R. Swan was appointed general agent of the New Brunswick Co., at a salary of \$1000 a year.

That, at a meeting of the board of directors of the New Brunswick Co., in the city of New York, on the 4th of May, 1836, the following resolution was passed and entered on the minutes: "*Resolved*, That Messrs. Abbe and Fish be allowed at the rate of \$1500 a year, from March 1st, 1836, for their services as agents, in conducting the railroad transportation business."

That the service rendered by Abbe and Fish, as agents, the bill charges, was as agents for the New Brunswick Co., in the transportation of merchandise and passengers on the Camden and Amboy Railroad, and that the New Brunswick Co., by appointing said agents, and by paying their salaries, recognized the contract between them and the Camden and Amboy Railroad Co., above set forth; that at the time of the said resolution for paying Fish and Abbe for their services as agents, as aforesaid, E. A. Stevens and James Neilson were present, and voted for it.

That the said New Brunswick Co. are not authorized, by their charter, to engage in the business of transporting goods, merchandise or passengers, or to transport the mail on the said railroad, or to employ any of their capital for that purpose, and that said Stevens and Neilson committed a breach of trust and violation of their duty, as directors of the New Brunswick Co., in entering into any arrangement in behalf of said company to do so, and to pay any of the funds of the New Brunswick Co. to said Fish and Abbe, for their services as agents of said New Brunswick Co., in such transportation on said railroad.

That when the said resolution was passed by the board of directors of the Camden and Amboy Co., Stevens was a director of said company, and the active agent and superintendent of the

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business thereof; and the said James Neilson was a director, or treasurer, or both, as well as a stockholder in the Delaware and Raritan Canal Co., the stock of which had, by an act of the legislature, passed February 15th, 1821, been consolidated with the stock of the Camden and Amboy Railroad Co., and the stock of the two last-named companies made joint stock.

That on the 16th of January, 1836, at a meeting of the board of directors of the New Brunswick Co., at New Brunswick, at which E. A. Stevens, James Neilson and Isaac Fisher were present, the accounts of the treasurer were duly examined and audited, and ascertained to be correct; and it was resolved that the amounts of the receipts and expenditures, from the books of the treasurer, be entered in the book of minutes, which was done, as follows:

The amount received for freights and passengers as per treasurer's books.....	\$25,519 76
To expenditures for sundries.....	14,657 77

By amount received from H. R. Swan, on account of transportation.....	\$9,706 46
To amount paid for barges.....	\$38,133 26
To cash received on stock subscribed.....	\$18,259 01
Sale of sloop J. Bennet,	2,400 00
Jas. Neilson's note.....	2,000 00
	22,659 01
	15,474 25

Balance in treasurer's hands.....	\$5,115 20
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That, immediately following the account above stated, there was entered in the book of minutes of the New Brunswick Co. the following resolutions, viz., "*Resolved*, That the above balance be retained in the hands of the steamboat Napoleon.

"*Resolved*, That H. R. Swan be requested to settle with Hill, Fish and Abbe for the year 1835, in accordance with the agreement made December 29th, 1834, with them, as entered on the book of minutes of that date."

That the sum of \$9706.46, stated in the above account to have been received from H. R. Swan on account of transportation, was the receipts on account of moneys received by him, as

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agent of the New Brunswick Co., for the transportation of goods and merchandise across New Jersey on the Camden and Amboy Railroad, and paid to him by their agents, Hill, Fish and Abbe, for the year 1835.

That there is no agreement with Hill, Fish and Abbe, entered in the minutes of the board of directors, under the date of December 29th, 1834, or any other date, or any such agreement entered in the minutes of the said board.

That after the transfer of the one-half of the respective shares of the stockholders, as aforesaid, to said E. A. Stevens, as attorney for Hill, Fish, Abbe and others, as aforesaid, Stevens assumed the control of the company, and, by means of a majority of the stock of the company, which, by the said arrangement, he secured to himself and brothers, Robert L. and John C. Stevens, and to the following directors of the Delaware and Raritan Canal Co., viz., Robert F. Stockton, John Potter, James Neilson and John R. Thomson, secretary of the joint companies aforesaid, he, the said E. A. Stevens, was enabled to elect such directors of the New Brunswick Co. as he thought proper; and thereby has ever since continued to control the action of the said company, to suit his own views and purposes.

That after Stevens and his associates were elected directors of the New Brunswick Co., he took from the Union Transportation Line the business of transporting goods and merchandise between New York and Philadelphia, on the canal and on the Camden and Amboy Railroad, and gave it to the New Brunswick Co., and appointed, or caused the said Fish and Abbe to be appointed agents for conducting the railroad transportation business.

That at a meeting of the directors of the New Brunswick Co., held in New York, May 4th, 1836, it was resolved that Messrs. Abbe and Fish be allowed at the rate of \$1,500 a year from March 1st, 1836, for their services as agents in conducting the railroad transportation business; also, *Resolved*, That should Messrs. Abbe and Fish not accept the said terms, that then their accounts be settled for the months of March and April, 1836, and that the same amounts be allowed them for their services as they received for the year 1835, to wit:

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Whole amount received.....	\$16,814 51
Refunded ,.....	2,212 04
12 months	\$14,602 47
Per month.....	\$1,216 87
Per month for each.....	\$402 29

That at a meeting of the directors of the New Brunswick Co., held in New York, December 30th, 1836, the following resolutions were passed, viz.:

"After due consideration upon the application of Morris Buckman for the purchase of ten coal barges, it was resolved to offer him the said ten barges at less than cost, viz., \$33,000, the payments to be made as follows:

"One-fourth, viz., \$8250, cash, upon signing the articles.

"One-fourth, do. \$8250, on the 1st of January, 1838.

"One-fourth, do. \$8250, on the 1st of January, 1839.

"One-fourth, do. \$8250, on the 1st of January, 1840.

"The three last payments to be satisfactorily secured."

"*Resolved*, That upon these terms the company will purchase 20,000 tons of coal, at circular prices; the coal to remain in possession of the company until other satisfactory security be substituted for it.

"*Resolved*, That it be understood that the said ten barges are to be confined to the carrying of coal, and in no wise to interfere with the transportation business of the company.

"*Resolved*, That Miller & Bancker, C. F. King & Co., be offered to continue the association in the canal transportation business, upon the same terms as they were conducted during the season of 1836.

"*Resolved*, That the rates of towing the barges of A. B. Cooley and associates be the same as charged Miller & Bancker and C. F. King & Co. on each boat, provided that the company can depend upon a regular number each week, in order to make the necessary arrangements for steam.

"*Resolved*, That the secretary be requested to inform Morris Buckman, Miller, Bancker & Co., and A. B. Cooley and associ-

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ates of their respective resolutions.

“*Resolved*, That a dividend of \$40 a share upon the stock of the company be declared, and paid to the stockholders by the treasurer, on and after January 1st, 1837.”

That, on or about January 1st, 1837, some arrangement was made by Stevens, for or on behalf of the New Brunswick Co., and the directors of a company called the Merchants' Line Company, the nature and particulars of which the complainant is ignorant of, except so far as they are disclosed by the following resolutions entered on the book of minutes of the board of directors of the New Brunswick Co., over the date of February 1st, 1837.

At a meeting of the directors of the Merchants' Line Company, the following resolutions were adopted, viz. :

First. That the line shall be called hereafter the Merchants' Line, conducted exclusively at New York by Miller & Bancker, and at Philadelphia by C. & F. King.

Second. That the line shall be conducted from New York, from piers Nos. 2 and 6, North River, at a yearly rent of whatever may be paid for said piers and wharves, deducting all rents and wharfage collected, including store-house, No. 31 Washington street, and at Philadelphia, No. 19 South Wharves, at a yearly rent of wharves and office of \$2800 ; and is understood that all wharfages and storages collected shall be deducted from rent paid.

Third. That the settlement of line shall take place at Bordentown, monthly, on all way-bills of the lines, and vouchers and a list of uncollected bills to be presented at each meeting. Regular monthly pay rolls to be made out for monthly laborers and clerks, and be by them receipted.

Fourth. The New Brunswick Steamboat and Canal Transportation Co. shall tow one or more barges from each city every other day, at \$25 per passage, and that all light boats shall be half price.

Fifth. That the barges of each line shall be kept in good order by their respective owners.

Sixth. That the proprietors of each line shall put in the line an equal quantity of barges.

Seventh. That this arrangement shall go into effect on the 1st

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day of January, 1837, and shall continue for one year.

Eighth. That the earnings of the line shall be equally divided and all responsibilities equally borne.

Ninth. That all clerks employed in the Merchants' Line, also captains employed in barges, pass free from city to city.

Tenth. That the New Brunswick Co. furnish, at each end of the line, a competent clerk to take charge of the books of the Merchants' Transportation Line, under the direction of Messrs. C. & F. King and Miller & Bancker.

C. & F. KING.

MILLER & BANCKER.

H. R. SWAN, for New Brunswick Steamboat and Canal Transportation Company.

New York, February 1st, 1837.

That at a meeting of the directors of the New Brunswick Co., held at Spotswood, January 23d, 1838, at which E. A. Stevens, James Neilson, Miles C. Smith and Isaac Fisher were present, the following entry was directed to be made in the minutes of the board, viz.: The accounts of the treasurer were duly examined and found to be correct, when it was resolved that the receipts and expenditures be entered in the book of minutes of the secretary.

The amount received for freight and passengers of steamboat Napoleon, per treasurer's books, 1836 and 1837..... \$40,808 37

The amount of disbursements for 1836 and '37... 27,562 10

\$13,246 27

Resolved, That a dividend of \$40 a share of said company be declared and paid to the stockholders from the above earnings, by the treasurer, on the 1st of February, 1838.

The bill states that the above statement of the receipts and disbursements for the years 1836 and 1837, was handed by E. A. Stevens to the complainant, who was at that time secretary of the board of directors of the New Brunswick Co., with a request that he should enter the same in the minutes of the board; and that he, the complainant, entered the same accordingly, supposing at the time that the same was correct; but he has since discovered that the said statement is entirely incorrect:

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and that the receipts of the Napoleon for 1836 were \$25,116.85, and for 1837 \$28,540.57, being for the said two years, \$53,657.42, instead of \$40,808.37; which, after deducting the disbursements for those years, as stated in said entry, and also the dividend of \$40 a share on 200 shares, ordered to be paid on the 1st of February, 1838, would leave in the treasury on that day a balance of \$18,095.32, instead of \$5246.27, the balance, according to the erroneous statement, entered in said book of minutes by order of said E. A. Stevens.

That on the 7th of May, 1838, at a meeting of the stockholders of the New Brunswick Co., held at New Brunswick, Edwin A. Stevens, James Neilson, Miles C. Smith, Isaac Fisher and Ira Bliss were elected directors for the ensuing year; and that the said Ira Bliss was then and still is a clerk in the employ of the Camden and Amboy Railroad and Transportation Co.

That the complainant has been informed and believes, that there has never been any election of directors made by the stockholders of the New Brunswick Co. since 1838; and that said Stevens and Neilson designedly omitted to hold any election for directors, for the purpose of, perpetuating the control of the said E. A. Stevens.

That the complainant believes that the others persons alluded to by Stevens in his said report made December 5th, 1835, were Robert L. Stevens, Robert F. Stockton, John Potter, John R. Thomson and John C. Stevens; that these persons, together with said James Neilson and Benjamin Fish, (one of the firm of Hill, Fish & Abbe,) were all at the time directors either of the Camden and Amboy Railroad and Transportation Co., or of the Delaware and Raritan Canal Co., and controlled the concerns of said joint companies according to their own discretion; they either owning or controlling a majority of the stock of said joint companies, and electing such directors as they saw proper. And the complainant states, as a reason for his belief, that it appears by the books of the treasurer of the New Brunswick Co., previous to the year 1839, that Robert L. and E. A. Stevens were the owners of 50 shares of the stock of that company; Robert F. Stockton of 22 shares; John Potter of 20 shares; James Neilson of 12 shares; Benjamin Fish of 6 shares; John R.

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Thomson of 5 shares ; John C. Stevens, 4 shares—in all, 119, of the 200 shares of the New Brunswick Co., owned by the said directors of the said joint companies.

That a considerable number of the remaining shares of the stock of the New Brunswick Co. were held by the agents, engineers, or clerks of the said joint companies, or by persons otherwise interested in the said joint companies, as by a list of the stockholders of the New Brunswick Co., annexed to the bill, will appear.

That the complainant was appointed secretary of the board of directors of the New Brunswick Co. at the first organization of the board, in 1831, and continued to act as such till April, 1839, and to enter the transactions of said board, and to keep the book of minutes in his custody ; but that some time in said year, Miles C. Smith, president of the company, applied to him and told him that James Neilson wanted to borrow the book of minutes from the complainant ; that the complainant, believing that Neilson wanted the book for the said E. A. Stevens, replied that if they got the book, it would not be returned, and, so believing, he did not, at that time, deliver the book of minutes to said Smith. But, soon after said application to him, he, the complainant, bought a blank book, and copied into it the minutes of the proceedings of the company from the original book of minutes, and, after he had transcribed the whole of the minutes into the blank book, he delivered the said copy to the said Smith, who, as the complainant was informed and believes, handed it to Neilson, who delivered it to said E. A. Stevens ; but the complainant kept the original book of minutes, and still keeps the same in his possession, ready, &c., and to which he refers.

That the book he so delivered has never been returned to the complainant, and he has never been able to obtain possession of it, though, as such secretary, he was entitled to the custody of it, and though, as he believes, he is still the secretary of the company, and has no knowledge that he has ever been turned out of his said office, or that any other secretary has been appointed.

The complainant believes and charges that Smith delivered the said book to Neilson, and that Neilson, shortly after, deliv-

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ered it to E. A. Stevens ; that, since that time, he has been able to procure but little information in relation to the proceedings of the company, and that he has not been requested to attend, as secretary, any meeting from the time he delivered the said book of minutes to said Smith, and he believes the reason is because Stevens manages, controls, and directs the business of the company at his will and pleasure, and because he wishes to keep secret the proceedings of the company, and that when he calls in two other directors, it is only as matter of form, to ratify what he has already done, or determined to do.

The bill states that Stevens refuses to give the complainant any account or information as to the manner in which he conducts the affairs of the company, and that he claims a right to conduct them in his own way, and not to give any account of his proceedings, under pretence that he represents the stock of a majority of the stockholders.

That since Stevens has had the control of the company, he has expended, or caused to be expended, very large sums, some for the purposes of the company, and some for purposes wholly foreign to the objects of the company, and without rendering any account to the stockholders or to the board of directors of the company, and without causing the same to be entered in the minutes of the company.

That he purchased with the funds of the company, and without the consent of the stockholders, four iron steamboats, for \$42,703.63—a larger sum than they were worth—which were bought, as the complainant is informed and believes, of Robert F. Stockton, who acted as a director and stockholder in said company at the time ; and the complainant believes and charges, it was not necessary for the purpose of carrying on the legitimate business of the company, that said boats should be purchased at the time they were purchased.

That said Stevens, between April 1st, 1835, and April 1st, 1846, purchased, with the funds of the New Brunswick Co., and without the consent of the stockholders, a steamboat called the Raritan, at about \$50,000 ; three schooners, called the Delaware, Porpoise, and Whale, at about \$2500 each, and one iron steamboat, called the Mars, at about \$9000 ; fifteen freight barges, at

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about \$3000 each, sixteen coal barges, at about \$2000 each, and one steamboat, called the *Hornet*, at about \$16,000.

That the only kind of boats which the New Brunswick Co. are authorized by their charter to buy, hold or employ, are either steamboats or canal boats; and that, since their purchase by said Stevens, he has caused the said schooners to be employed in carrying freight between Amboy and New York; and that since April, 1846, two of said schooners have, by the direction or consent of Stevens, been employed in carrying freight between South Amboy and New York. That such purchase and employment of said three schooners was a breach of trust in Stevens, and a violation of his duty as a director of said company.

That the complainant believes and charges, that the said three schooners were purchased by Stevens for the purpose of enabling him to carry into effect the illegal contract entered into between the Camden and Amboy Railroad and Transportation Co. and the New Brunswick Co., and consummated by said Stevens and herein before related.

That the New Brunswick Co. are only authorized to employ their boats and steamboats between Philadelphia and New York and the intermediate ports; but that Stevens, in violation of his duty as a director, and of the provisions of the charter of the New Brunswick Co., has caused the said iron steamboats belonging to the company to be employed in the transportation of goods and merchandise between Philadelphia and Albany, and Philadelphia and Hartford.

That Stevens purchased, or caused to be purchased, without the consent or knowledge of the stockholders of the New Brunswick Co., with the funds of the said Company, certain real estate in Philadelphia, called the Walnut street property, and caused the title thereof to be vested in one of his brothers, (under pretence that the company could not hold real estate in Pennsylvania). That the said real estate was not necessary for the objects of the incorporation, and that the purchase thereof, with the funds of the company, was a breach of trust and violation of the duty of said Stevens as a director of the said company.

That Stevens bought, with the funds of the company, and without the knowledge of the stockholders, certain real estate in

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Bristol, Penn., consisting of two houses, not necessary for the objects of the incorporation, and caused the deed for the same to be made to Benjamin Fish, under the same pretence, and that this purchase was, also, a breach of trust in him, and a violation of his duty as a director.

That, in or about the year 1840, the said Stevens, as sole manager and superintendent of the New Brunswick Co., or he and Neilson and Thomson, or some other director instead of Thomson, loaned to said Stevens, as an individual, the funds of the New Brunswick Co. to the amount of \$14,400, or some other large sum, and took, as the complainant believes, only the personal security of Stevens for the repayment thereof, with interest. That the New Brunswick Co. are not authorized by their charter to loan money; and that this loan was a breach of trust in Stevens and the other directors who assented to it, and a violation of their duty as directors; and that no entry or minute of said loan has been made in the minutes of the board of directors.

That Stevens, Neilson and Thomson, or one of them, have, as complainant is informed and believes, loaned to other individuals, unknown to complainant, and without the consent of the stockholders, other large sums of money of the company amounting to about \$12,000, also in violation of their trust, and in breach of their duty as directors.

That the complainant has been informed and believes that an agreement was entered into by the joint companies called the Delaware and Raritan Canal Co. and the Camden and Amboy Railroad and Transportation Co., or by one of them, or by some of their agents or directors, or the agents or directors of one of them, for or on their joint behalf, or for or on behalf of one of said companies, with the New Brunswick Co., or with said Stevens or some other director of the New Brunswick Co., on their behalf, that the New Brunswick Co. should pay to the said joint companies, or one of them, an aggregate yearly sum for the transportation of merchandise or freight on the Delaware and Raritan canal, and that the New Brunswick Co. should have all the profits over and above the said aggregate amount so agreed to be paid.

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That the Walnut street property, so as aforesaid purchased by Stevens previous to 1843, has yielded an annual interest of 15 per cent. on the amount paid for it, and has increased in value to nearly double that amount. That at a meeting of the directors of the New Brunswick Co., at New Brunswick, on the 18th of March, 1847, Stevens admitted that this Walnut street property was bought for the New Brunswick Co; but said that, by the laws of Pennsylvania, the company could not hold real estate in that state; and the complainant replied that Benjamin Fish had told him that said property had not been deeded to the company, but that Robert L. Stevens held it in trust for the company; and that E. A. Stevens admitted that statement to be correct, and then said that a trustee could not hold it for the company, and that Horace Binney had given such an opinion, and that the \$43,000 was invested in property in Camden and drawing six per cent. That this was the first information or suspicion of the complainant that any of the funds of the New Brunswick Co. had been invested in real estate in Camden, New Jersey.

The bill charges, that the application of the funds of the New Brunswick Co. to the purchase of land in Camden was a breach of trust in said E. A. Stevens, and a violation of his duty as a director; and, the complainant believes and charges, that the reason why the title of the Walnut street property was changed from the trustee of the New Brunswick Co., and the amount of money paid for it vested in property in Camden, was, because the Walnut street property had nearly doubled in value since it was purchased with the funds of the New Brunswick Co., and to enable E. A. Stevens and his associates to appropriate to their own use the increased value of the said property, which of right belonged to the New Brunswick Co.

That the said New Brunswick Co., ever since the commencement of their operations, have done a very profitable business; and that after the business of transporting goods on the railroad was taken from the Union Transportation Line, and given to the New Brunswick Co., the business and profits of the company were very much increased, as would fully appear if the books of the company were produced.

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That the New Brunswick Co. continued to do the business of transporting goods on the canal and on the Camden and Amboy Railroad, between New York and Philadelphia, from 1835 to April 1st, 1846. That, from the earnings of the Napoleon and the sloop James Bennet, the company declared a dividend of \$55 on each share, on the 15th of February, 1833, and another dividend of \$45 a share, on the 4th of December, 1833, being an aggregate dividend, within ten months, of \$100, derived from the earnings of only two of the complainant's boats.

That on or about January 30th, 1846, E. A. Stevens caused a meeting of the directors of the New Brunswick Co. to be convened at Trenton, at which meeting the said Stevens, James Neilson, J. R. Thomson and Miles C. Smith attended. And the complainant shows, that Smith, the president of the company, made inquiry of Neilson and Stevens what the object of said meeting was ; and he was given to understand that its object was to take the business of transporting merchandise and other articles on the Camden and Amboy road from the New Brunswick Co., and give it to the Union Transportation Co., or some other company ; and thereupon the said Smith refused to preside at said board, or take any part in the proceedings thereof. And then the said Stevens, Neilson and Thomson proceeded to elect, or pretended to elect, Richard Stockton as a director, in the place of his father, Robert F. Stockton. That the said pretended election was wholly illegal and void, there being no vacancy at the time, and there having been no notice given of a meeting of directors for the purpose of such election, and no notice given of any special election for directors according to the directions of the charter and the by-laws of the company. That after the said pretended election, the said Richard Stockton took his seat at the board, and Stevens, Neilson, Thomson and said Stockton passed, as the complainant has been informed and believes, some resolution to take away the business of transporting goods and merchandise on the Camden and Amboy Railroad from the New Brunswick Co., and give it to the Union Transportation Company. And that, in pursuance or under pretence of the resolution thus illegally passed, the said Stevens did, on or about April 1st, 1846, take from the New Brunswick Co. the said busi-

ness, and give it to a fictitious company, called the Union Transportation Line. That in truth there is no such company or association as the Union Transportation Line now in existence, but that the name "The Union Transportation Line" is a mere name, under which E. A. Stevens has directed the business of transporting goods across New Jersey, between New York and Philadelphia, to be done, for the purpose of concealing the names of the persons actually interested in the said business, or for some other motive.

That previous to the 1st of April, 1846, and while the business of transporting goods between the said cities was carried on by the New Brunswick Co., under the direction and supervision of said Stevens, the receipts given by the agents of the said company for articles delivered to them for transportation on the railroad across New Jersey, had the following commencement or caption to them, viz.:

"Union Transportation Line.

"Between New York and Philadelphia, via railroad across New Jersey.

"New Brunswick Canal and Steamboat Transportation Company, proprietors.

"For the conveyance of merchandise, specie, baggage, &c., &c., and insurance effected, whenever required, on any package to its full amount of value.

"Office in Philadelphia, No. 45 South Wharves, two doors below Walnut street, W. S. Freeman, agent; New York, on pier No. 2, North river, near the Battery, A. Decker, agent."

That the words, "New Brunswick Canal and Steamboat Transportation Company" were first inserted by the agents of the New Brunswick Steamboat and Canal Transportation Co., shortly after the said E. A. Stevens and James Neilson became directors of that company, and Stevens, for himself, and as attorney for others, acquired a majority of the stock of said company; and that the said words were continued in the caption to all the printed receipts given by the agents of the New Brunswick Co., until April 1st, 1846, when they were left out; and, the complainant charges, were left out by the direction of Stevens.

The bill states that if the New Brunswick Co. ever were the

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proprietors of the Union Line, they have done no legal act to transfer the proprietorship to any person or persons, or body corporate, but remain the proprietors of said line still ; and that if there is any such company or association still in existence, or if it possesses any property, the same belongs to the New Brunswick Company.

That after Stevens had, within the period of eight or nine years, expended or caused to be expended \$200,000 and more of the money of the stockholders of the New Brunswick Co. in the purchase of steamboats, iron propellers, schooners, freight barges, coal barges, docks, wharves, houses and other property, for the purpose of accommodating the public, and transporting all the merchandise and other articles on the canal and railroad between New York and Philadelphia, Stevens, without consulting the stockholders, and without giving any previous notice to the directors of such intention, by the aid of his associates, James Neilson and John R. Thomson, caused the said business of transportation on the railroad to be taken away from the said New Brunswick Co., and thereby deprived them of the great profits arising therefrom ; and that such act of Stevens, Neilson and Thomson was a breach of trust, and violation of their duty as directors of said New Brunswick Co.

That notwithstanding Stevens has had the control and management of the New Brunswick Co. since the beginning of 1836, yet that he has not fully accounted for the earnings of the steamboat Napoleon from that time to the summer of 1839, nor of the steamboat Raritan, (the property of said company,) from the year 1840 to the present time, which earnings, the bill charges, amount to \$50,000 ; and that Stevens has not accounted for the earnings of the two schooners belonging to the New Brunswick Co., which he has kept in the service of the Union Line, transporting goods and merchandise between South Amboy and New York.

That the New Brunswick Co. were the proprietors of what was called the Union Transportation Line, which line carried freight and merchandise from Philadelphia to New York, by the way of the Camden and Amboy Railroad, and the earnings of said line belonged to said New Brunswick Co. ; and that Ste-

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vens had the sole control and management thereof, yet has not accounted with the stockholders or directors of the said company for said earnings, from 1836 to 1846, during which period the earnings of said line amounted, as the complainant believes and charges, to about \$400,000.

That, notwithstanding Stevens caused to be purchased with the funds of the New Brunswick Co., four iron steamboat propellers, called the Black Diamond, the Ironside, the Vulcan, and the Anthracite, and the iron steamboat Mars, and also freight and coal barges, and caused them to be employed on the Delaware and Raritan canal in the transportation of merchandise, coal and other freight, between New York and Philadelphia and other places; and though they were under the sole control and direction of Stevens from 1836 to 1846, yet that Stevens has never rendered to the stockholders of the company any account of the earnings thereof, nor made any dividend of the earnings thereof among the stockholders, or given them any explanation or satisfaction in regard to his management thereof.

That the complainant is informed and believes, that Stevens caused to be purchased with the funds of the New Brunswick Co., a large number of freight cars, for the purpose of carrying freight on said railroad, while said company carried freight and merchandise thereon, in the name of the Union Transportation Line; and that said Stevens has never made any report to the stockholders of the purchase of said cars, or of their number or value, nor any dividend of the earnings of said cars, or of the business done by said company on said railroad.

That, notwithstanding the expenditure of \$43,000 by, or under the direction of Stevens, for the Walnut street property in Philadelphia, in 1843, yet he has rendered no account to the stockholders of the New Brunswick Co. of said purchase, or of the rents and profits thereof, nor made any dividend of such rents or profits, though the same must produce an annual rent of more than \$6000.

That the books of the New Brunswick Co., excepting the book of minutes of the board of directors and the books of the treasurer, are in the possession of William Anderson and Abel Deck-

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er, in New York, and of William H. Gatzmer and William S. Freeman, in Philadelphia, and that the treasurer's books are in the possession of Abraham S. Neilson, in New Brunswick, and the book of minutes of the board of directors since April 19th, 1839, the complainant believes to be in the possession of said E. A. Stevens; and that said books are, by the orders and direction of Stevens, kept concealed from the stockholders of the New Brunswick Co., although the stockholders, or some of them, have made repeated efforts to see and have an opportunity to examine them.

That the office of the directors is required by the charter to be kept in this state; and that Stevens, since he has taken the control and management of the company, has not kept any office of the directors, or for the directors, or for the books and papers of the directors of the company, in this state; and that in neglecting to keep the office of directors in this state, the said E. A. Stevens has also violated his duty as a director of the company.

That Stevens, though repeatedly called on by the complainant, and by other stockholders of the New Brunswick Co., has wholly refused to make any statement of the affairs of the company, or to give them any information of the earnings or profits of the company.

That Stevens, being called on by the complainant, on the 18th of March, 1847, and requested to give him a statement of the earnings and profits of the company, replied that he managed the same as a close corporation, and that he should not give any statement of the earnings, profits, or business of the company to the complainant.

That, on or about March 23d, 1847, Stevens, without the consent of the stockholders, has sold 16 coal barges, the property of the company; and the complainant has been informed and believes, and therefore charges, that he intends to sell 16 freight barges, and that he will do so, unless restrained by this court. The complainant charges that said sale of barges by Stevens, without the consent of the stockholders, and without any lawful authority vested in him for that purpose, is a violation of his trust and of his duty as a director.

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That Stevens caused the business of transporting goods and merchandise on the Delaware and Raritan canal, between Philadelphia and New York, and Philadelphia and Albany, and Philadelphia and Hartford, done by the New Brunswick Co., to be done in different names, and to be called by the name of various lines—sometimes in the name of the Merchants' Canal Line Steam Towboat Co., sometimes in the name of the Merchants' Canal Line, sometimes in the name of the Merchants' Transportation Line, and sometimes in the name of the Merchants' Line, and caused the books and accounts of freight carried by the New Brunswick Co. to be kept in the names of the lines above stated, or one of them, and that he caused the business of transportation done by the New Brunswick Co., on the Camden and Amboy Railroad, and by that railroad, through from New York to Philadelphia, to be done, sometimes, in the name of the Union Transportation Line, sometimes in the name of the Union Transportation Line New Brunswick Canal and Steamboat Transportation Company Proprietors, and sometimes by the name of the Union Line, and that he caused the books and accounts of the business of transportation done by the New Brunswick Co., on the said canal and railroad, and between New York and Philadelphia, to be kept in the names of said lines, for the purpose of concealing and keeping secret the operations and business of the said New Brunswick Co., and to prevent them and the public from obtaining any information in relation to the proceedings of the said company.

That the assumption of said Stevens to continue the business of the company as a close corporation, and to prevent the stockholders from having information in relation thereto, and his refusal to give the stockholders any account of the earnings of the company, is a breach of trust and violation of his duty as a director.

The bill prays that said E. A. Stevens, James Neilson, and John R. Thomson may set forth a full account of all the property, real and personal, which they, or either of them, have bought with the money of the New Brunswick Co., from the year 1834 to this time, and of the rents and profits of the real estate bought by Stevens, or by any other person, with his knowledge and con-

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sent, with the funds, or upon the credit of the New Brunswick Co., which have come to the hands of said Stevens, or of any other person, for his use, or for the use of the said company, with his knowledge or consent, during the time aforesaid. And that he may account for all the moneys received by him, either as a director, treasurer, agent, manager, or superintendent of the company, or of the business of transportation done by the boats, steamers, barges, cars, or engines of the New Brunswick Co., in whatever name the same was done. And that Stevens may account for all moneys of the New Brunswick Co. expended by him, or by any person for him, or by his knowledge or consent, in the purchase of steamboats, barges, or other vessels, or of railroad cars or engines, or any other personal property, or in the purchase of real estate in New Jersey or elsewhere.

And that Stevens, Neilson, and Thomson may account for all breaches of trust as directors, agents, trustees, or superintendents of the New Brunswick Co., and for all misappropriations of the money of said company, and make good all losses which the company may incur by reason of any breach of trust; and may account for all moneys made by them, or either of them, by the purchase or sale by them, or either of them, of any property, real or personal, of the company.

And that Stevens, Neilson, and Thomson may be decreed to pay the complainant his proportionate share, as a stockholder of the New Brunswick Co., of what may be found due and owing from them, or either of them, on the taking of said account, or else to pay the same to a receiver, to be appointed by this court.

And that Stevens be decreed to pay the complainant his proportionate share of the said \$14,400, with the interest thereon, due from said Stevens to the company, or to pay said \$14,400 to a receiver, to be appointed; and also to pay the complainant his proportionate share of the proceeds of the sales of the said 16 coal barges sold by him; and also to pay the complainant his proportionate share of the earnings of the three schooners—Porpoise, Delaware, and Whale—from the time of the purchase thereof until the time of making said decree; or that he pay the whole amount of said earnings to a receiver; and that he be decreed to pay the complainant his proportionate share of all surplus

moneys in his hands, or in the hands of any person for him, belonging to the company, and not required for the business of the company, or to pay the same to a receiver; and that Stevens may set forth and discover whether he has loaned to himself, of the moneys of the company, or borrowed of himself as one of the directors of the company, or of his associates, Neilson and Thomson, or of any other and what directors of the company, any, and what moneys of the company, and when, and what security was given for the same; and whether said Stevens has loaned any of the funds of the company to any person or body corporate, and when, to whom, and what amount, and on what security; and that Neilson and Thomson may set forth and discover whether they assented to the loan of \$14,400 to Stevens, and when, and on what security; and whether any entry thereof was made in the books of minutes of the directors of the company; and whether they ever made any and what other loans of the moneys of the company, when, to whom, and on what security, and what amount.

And that Stevens, Neilson and Thomson may set forth and discover all the real estate purchased by them, or either of them, or with their or any of their knowledge, with the funds of the company, and when purchased, who from, and what was paid for it, and in whose name purchased, and who holds the title, and in whose occupation the same is, and under what rent, and who is and has been in the receipt of the rents and profits thereof, and for how long; and a full account of the rents received, when, and by whom, &c. And that the defendants may render a full account of the earnings of the boats, barges, vessels, &c., of the company for each year, separately, from January 1st, 1835, to this time, and of the yearly expenses of the same; and also an account of the business, earnings and profits of the Union Transportation Line, of which the New Brunswick Co. were or are proprietors, from the year 1836 to this time; and that the said confederates may produce the books of accounts of the New Brunswick Co., and of the various companies or lines in which, &c., and may leave the same with the clerk of this court, that the complainant, or any stockholder of the company, may

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examine them; and particularly the books of accounts of the Union Transportation Line.

And that the said confederates may set forth all and every contract made by them, or either of them, for or on behalf or in the name of the New Brunswick Co., or in any other name, for their use with the Camden and Amboy Railroad and Transportation Co., and the Delaware and Raritan Canal Co., or either of them, for the transportation of goods, &c., on said railroad, or on said canal, or on both, from April 1st, 1833, to this time, and when and by whom the same were made; and may set forth the names of all agents, clerks, managers and superintendents employed by them, or either of them, to collect or receive the moneys due or owing to the New Brunswick Co., from April 1st, 1835, to this time; and a true list of all the books of accounts in the hands of said Stevens, Neilson and Thomson, or either of them, or of their or either of their treasurers, agents, clerks, managers and superintendents, and of the books of the New Brunswick Co. or their treasurer, agents, &c., or either of them; and of the accounts, letters, papers, vouchers, memoranda and other writings relating to the property, estates, affairs, business and concerns of the said company, which are now or ever were in the possession of said Stevens, Neilson and Thomson, or either of them, or their or either of their treasurers, clerks, &c.; and that they may be decreed to set forth a true inventory of all the estate, real and personal, of the New Brunswick Co., in whosever name the title may be; and that all the property, real and personal, not necessary for the objects of the incorporation of said New Brunswick Co., be sold under the direction of this court, and the proceeds thereof divided among the stockholders, or paid to a receiver to be appointed, or otherwise secured and applied according to the trusts of said act of incorporation; and that the copy of the book of minutes of the said New Brunswick Co. obtained by said Smith from the complainant, and by him delivered to Neilson for said Stevens, may be ordered to be given up to the complainant as secretary of the company.

And that a receiver be appointed of the rents and profits of the real estate purchased at Camden with the funds of the New

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Brunswick Co. or for their use, and also of all other property, real and personal, purchased by Stevens with the funds or on the credit of said company, without the consent of the stockholders, and not necessary to the objects of their incorporation.

And that Stevens may be restrained from selling or disposing of, or causing to be sold or disposed of, any real estate purchased with the funds of said company, or held in trust for them, and from applying any of the funds or credit of said company to any object or purpose not necessary to the objects of the said act of incorporation and not authorized by the same ; and from selling or disposing of any of the steamboats, iron propellers, freight barges, coal barges, cars or engines of said company without the consent of the stockholders ; and from managing and controlling the affairs of said company as a close corporation, or in his own way or at his own will and pleasure, and without the consent or authority of a lawfully constituted board of directors.

On the reading and filing of this bill an injunction was issued, according to the prayer thereof.

Notice was given on the part of the complainant of an application to be made to the Chancellor, at Trenton, on the 16th of April, 1847, for the appointment of a receiver of the rents and profits of the real estate purchased at Camden, New Jersey, with the funds of the New Brunswick Co., and of the rents and profits of the real estate purchased in Philadelphia and Bristol, Pennsylvania, with the money of the New Brunswick Co., and of the \$14,400, money of the New Brunswick Co., illegally loaned to E. A. Stevens, and also of all other moneys illegally loaned by Stevens, Neilson and Thomson, or either of them, to any other person ; and that the usual directions may be given to such receiver, or for such other order and directions as may be just,

On the 9th of April, 1847, a supplemental bill was filed, stating the service of the injunction on the 30th of March, 1847, and that since its service, Stevens caused a meeting of the stockholders of the company to be held at New Brunswick, on the 3d of April, 1847 ; that the notice served on the complainant by

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Abraham S. Neilson, was as follows :

“ Mr. John D. Hager :

“ Sir—You are requested to attend a meeting of the stockholders of the New Brunswick Steamboat and Canal Transportation Company, at the house of R. D. Stelle, in New Brunswick, on Saturday next, (April 3d,) on the arrival of the cars.

“ By order,

“ New Brunswick, March 29th, 1847. A. S. NEILSON.”

That in pursuance of said notice twenty of the stockholders attended ; that he believes the whole number of stockholders at the time was thirty-two.

That after the said stockholders were assembled, E. A. Stevens nominated William Cook as chairman, and he was thereupon appointed chairman ; and Stevens then nominated Richard Stockton as secretary of the meeting, which was agreed to by the meeting. That Stevens nominated then the said William Cook, Richard Stockton and Isaac Fisher a committee to examine several general statements or schedules, in large sheets of paper, which had been previously laid on the table ; that the complainant then inquired when it was expected the said committee should report ; and it was thereupon stated by some one of the directors of the company, that the said committee could do no more than take a general search in the prepared schedule, comparing it with the books when necessary ; that the said committee were thereupon appointed, and the meeting adjourned till after dinner.

That at said meeting he saw lying on the table the copy of the book of original minutes which he had delivered to Smith in 1838 ; and that he opened it and found that various entries had been made in it since he had parted with it, and among others, an entry setting forth that a loan had been made by the directors of \$27,123, to the Camden and Amboy Railroad and Transportation Co., on the 20th of May, 1839.

The complainant states that the said loan was entirely unknown to him until he discovered it as aforesaid ; that the said loan was illegal, not only on the ground that the New Brunswick Co. have no authority, by their charter, to loan money, but because the Camden and Amboy Railroad and Transportation Co.

have no authority to borrow money ; and that the said loan is a violation of trust on the part of said Stevens, James Neilson and such other of the directors of the New Brunswick Co. as assented to it, and a violation of their duty as such directors.

That he also discovered an entry made in said book, signed by John R. Thomson as secretary, stating that the amount paid for the Walnut street property was \$46,616, instead of the amount stated in the original bill.

That when the said stockholders convened after dinner, the said committee made their report of the aggregate earnings and expenditures of the steamboats Raritan and Napoleon, employed on the river Raritan, and of the Railroad Transportation Line, of the canal line for freight of merchandise, and of the steam towing company, which report was read so hastily that it was impossible for the complainant to write down, or to retain in his recollection, the particulars thereof ; but, to the best of his recollection, the aggregate amount of the expenditures was rising \$4,000,000, and the aggregate amount of receipts was some \$220,000 over the amount of expenditures.

That the complainant asked permission of the chairman to have the sums stated in the report, and the chairman replied that the complainant should have them after the adoption of said report ; but the complainant says that after the adoption of the report he was not able to procure the same, either from the chairman, or the secretary, or anyone else ; that he then asked the chairman for the book of minutes, that he wished to examine it, and the chairman replied that he knew nothing about it ; that he then applied to the secretary, R. Stockton, for the book, and he replied that the complainant could not have it, that the gate was shut ; and while the complainant was talking privately with the secretary, J. R. Thomson turned to him, and in an angry manner told him not to let the complainant question him.

That said Thomson offered a resolution to the meeting, that the said company should go into liquidation. To this resolution some of the stockholders objected, and M. C. Smith, the president, made some remarks, and said that the difficulty could be easily overcome—"let the books be opened and all the stockholders see what the property is worth"—and moved that the com-

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plainant be permitted to see the books. This resolution was seconded by Mr. Laurence Fisher, one of the stockholders present. Upon this, E. A. Stevens rose, and in a rude and offensive manner said that Hager and his man, William Halsted, should not have the books; that while the resolution to go into liquidation was under consideration, the complainant offered, as an amendment to it, the following resolution, viz.: "*Resolved*, That the books be opened to every stockholder, and time be given for examination." This resolution the chairman refused to put to the meeting, or to allow any vote to be taken on it. The resolution offered by Thomson was then carried, Stevens, Thomson, J. Neilson, A. S. Neilson, R. Stockton, I. Fisher, William Cook, M. C. Jenkins, Ira Bliss, William McKnight and John McKnight voting for it, the complainant voting against it, and J. Bishop, Miles C. Smith, George Richmond, John Hatfield, Laurence Fisher and John H. Hoagland not voting.

That Mr. Patterson then inquired in what way the company would go on and wind up its affairs, as the Chancellor had already put an injunction on the directors, restraining them from disposing of the property of the company. To this question J. R. Thomson replied, in a low tone of voice, that the Chancellor had enjoined E. A. Stevens alone, and there would be no difficulty in getting rid of Stevens.

That soon afterwards Stevens moved that I. Fisher, A. S. Neilson, B. Fish, Wm. McKnight and J. McKnight be empowered to act with the board of directors in the sale of the property of the company; that the complainant protested and voted against this resolution, but that the same was passed by a majority of the stockholders then present, though the complainant believes and charges that the stockholders who voted for it were a minority of the whole number of the stockholders of the company, many of them not being present, and some of those present not voting on the resolution.

That on all the questions submitted to the said meeting, the vote was taken *viva voce*, each stockholder giving one vote.

That the number who voted for the resolution to go into liquidation, and the resolution offered by Stevens, was not more than thirteen; that the whole number of stockholders does not, as

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the complainant believes and charges, exceed thirty-three. That of this number twelve were absent, and six of those present did not vote, and the complainant voted against said resolutions.

The complainant insists that the whole property of the company ought not to be sold and the affairs of the company wound up, and the franchises of the stockholders taken from them without the consent of at least a majority of the whole number of stockholders, given at a special meeting called for the purpose, due notice of the object of the meeting being previously given to all the stockholders.

The complainant believes and charges that the said meeting of stockholders was got up by Stevens and Thomson, for the purpose of enabling them to elude the injunction against Stevens, and to enable them to dispose of the property before the complainant could take further measures to restrain them; and that the resolutions offered by Thomson and Stevens were concerted and contrived by them for the sole purpose of enabling Stevens to dispose of the property of the company, without the consent of all the stockholders, and in violation, virtually, if not literally, of the injunction issued in this cause; and that the stockholders who voted for the said resolutions offered by said Thomson and Stevens, were either directors, or agents, or engineers of the Camden and Amboy Railroad and Transportation Co., or of the Delaware and Raritan Canal Co., or interested in the same, or under the influence of the said Thomson and Stevens.

That the directors of the company are not authorized to discontinue the corporate business, and distribute the capital stock among the stockholders, and wind up the concerns of the company, without the consent of the legislature, though a majority of the stockholders should consent thereto. And the complainant insists, that the duty of the directors extends only to the conducting and carrying on the business of the company, and not to the commission of any act which shall destroy the company, or the vested rights or franchises of any of the stockholders; and that any act on the part of the directors having for its object to dispose of all the property of the company, and to wind up its concerns, or, in the language of the resolution offered by said Thom-

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son, to cause it to go into liquidation, is a breach of trust on the part of the directors who voted for said resolutions, and a violation of their duty as directors of the company.

That since he gave to his solicitor and counsel instructions for preparing the original bill, he has ascertained, from information on which he places reliance, and therefore charges that said Stevens, without the consent of the board or stockholders, purchased with the funds of the company, nine shares of the stock of said New Brunswick Co., for the sum of \$10,361, or at the rate of \$1150 a share for stock, the par value of which is only \$250 a share.

That at the time the complainant gave instructions for preparing the original bill, he was under the impression that said Stevens had purchased eight shares of the stock of James Bishop, for himself, and with his own funds, and so informed his solicitor and counsel; and that he derived that impression from a conversation with said Stevens, in which Stevens, conversing about the purchase of said stock of said Bishop, made use of these words, or words to this effect: "If I choose to pay more for the stock than it is worth, it is no business of yours." That the complainant did not, until the original bill was filed, inform his solicitor and counsel that said stock had been bought by said Stevens with the money of the company.

That the purchase of said stock was not necessary for the objects of the corporation, and that the company have no right to purchase or hold the stock of the company in any manner not expressly authorized by the act of incorporation; and the complainant charges, that there is no express authority given in said act to purchase, hold or deal in stock; and that the purchase of the said eight shares of Bishop by said Stevens, with the funds of the company, and also the purchase of one share of the stock of the company of Frederick Richmond, by said Stevens, with the money of the company, was a breach of trust in Stevens, and a violation of his duty as a director.

That the complainant has learned, since the filing of his original bill, that the person to whom Stevens sold the thirteen barges, mentioned in the original bill, was Morris Buckman, who, the complainant charges, was the same person to whom said Ste-

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vens, or the directors of the company, sold ten barges, by resolution of December 30th, 1836, more fully set forth in the original bill. That Stevens well knew, at the time he sold said thirteen barges, that Buckman had never paid for the first ten barges he bought of the company in 1836, and that the company had lost upwards of \$17,000 by him, and to which amount, and more, he was still indebted to the company, at the time the said last sale of barges was made. That if the last-mentioned sale to Buckman was a *bona fide* sale, it was made at a price much less than the real value of said thirteen barges, it being only, as complainant has been informed, for about \$1400 apiece, whereas he charges that said barges, at the time of the sale, were worth \$2000 apiece.

The complainant charges that said sale of the thirteen barges, for the consideration aforesaid, and while the said ten barges remained unpaid for, was a breach of trust in Stevens, and a violation of his duty as a director.

The complainant states that he believes that said I. Fisher, A. S. Neilson, B. Fish, Wm. McKnight, and J. McKnight, together with the said directors—J. R. Thompson, J. Neilson, and E. A. Stevens—intend to proceed to dispose of all the property of the New Brunswick Co., and will do so, unless restrained by the injunction of this court.

This bill makes I. Fisher, A. S. Neilson, B. Fish, Wm. McKnight, and John McKnight, parties, and prays that they and the defendants to the original bill may answer it, and that it may be taken as and for a supplement to his original bill; and that the complainant may have the benefit of his original suit and proceedings against said I. Fisher, A. S. Neilson, B. Fish, William and John McKnight, and the same relief against them as against the defendants to the original bill; and that they and J. R. Thomson and James Neilson may be enjoined from disposing of any of the property of the company, or from winding up the concerns of the company, or from causing the same to go into liquidation, without the consent of all the stockholders, and for further relief.

The injunction prayed by this supplemental bill, was granted on the 9th of April, 1847.

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On the 17th April, 1847, the motion for the appointment of a receiver was made.

The answer of the defendants was put in on that day, and was read in opposition to the application.

The answer adverts to the act of incorporation, and says that, by the 11th section of the act, it is enacted that, at the first meeting of the directors, they shall choose a president from among themselves, to serve for one year thereafter, and until his successor is duly chosen; the president and directors shall meet at such times and places as they, from time to time, may agree on, for transacting their business; three directors shall constitute a quorum, and if the president be absent, they may choose one *pro tempore*. That by the 8th section, it is enacted that a general meeting of the stockholders shall be held on the first Monday in May, in New Brunswick, in each and every year, at such place as the company, or, in default thereof, the president, shall appoint, whereof three weeks' notice shall be given in the newspapers printed in New Brunswick; and the stockholders, between the hours of 10 and 3 of that day, shall, in person or by proxy, elect, by ballot, four directors, being stockholders, to serve for one year next after their election, and until their successors are chosen; and in case of the neglect or omission of the stockholders duly to elect directors at an annual election, the corporation shall not be thereby dissolved, and the old directors shall hold over, and continue in office until a new election shall be held, either at a special election or an ensuing regular annual election, and a special election may, at any time, be held in such manner and form, and upon such notice as the by-laws of the company may, for that purpose, prescribe.

That at the time of and before the passage of the act of incorporation, the said Bishop, Richmond, Dunham, Fisher, and Smith—named in the act—and the complainant and Laurence Fisher, had associated for the purposes in the act mentioned, and had procured the passage of the first act, and that the defendant E. A. Stevens and others were then, and had theretofore been interested in a line of steamboats which plied between New Brunswick and New York, for transporting passengers and freight, called and known as "The Union Line," and that im-

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mediately after the passage of said act, viz., on the 24th of January, 1831, and before the books were opened for subscription for the stock, the associates above named, the complainant Hager being one of them, and being present, acting therein, appointed a committee to confer with the defendant Stevens and the persons interested with him in the Union Line, for the purpose of inducing the proprietors of the Union Line to unite with the said associates, and contribute to the capital stock, and bring to the aid of the said incorporation, for the creation and enlargement of its business and patronage, the good will and business of the Union Line, the capital and influence of the proprietors thereof, for the profit and advantage of the said associates; and thereafter the books were opened and stock subscribed, and the installments paid, as stated in the bill. And, thereupon, the stockholders purchased, with the funds of the company, the steamboat Napoleon and sloop James Bennet, and commenced the business of transportation between New Brunswick and New York; and thereafter, on the 16th of May then next, the first election of directors was duly held.

And the defendants Stevens and Neilson, of their own knowledge, and Thomson on information believes it to be true, say, that the said associates appointed the said committee, and the said subscribers severally subscribed for stock, in the hope that they should be able to induce the proprietors of the Union Line to unite with them; and for that purpose they did, from time to time, between January 24th and May 16th, 1831, entirely without any application or proposal to them by said Neilson, Stevens, or any other person, to the knowledge of these defendants, or either of them, apply to said proprietors of the Union Line, through said Stevens and Neilson, not only by the said committee, but also by others of said stockholders, and by the complainant, to induce the proprietors of the Union Line to unite with them as aforesaid; and on such application, and not on any application or endeavor made by said Neilson or Stevens, or any other person, to obtain the control of said company, so far as these defendants have any knowledge, information, or belief, a negotiation ensued, which resulted in the purchase from the subscribers, by said Stevens, for himself and others interested with

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him in the Union Line, of 104 shares of the stock, and by said Neilson of 12 shares of the stock ; and the said subscribers, thereupon, and before the 16th of May aforesaid, respectively transferred to said Stevens, Neilson, and others, the stock so purchased, among whom was the said George Abbe, who, as a member of the firm of Hill, Fish & Abbe, had theretofore been employed as the agents of the said Union Line, upon commission, and were interested therein, the complainant Hager voluntarily selling and transferring, for that purpose, 22 of the shares subscribed for by him.

And the defendants answering as aforesaid say, that neither Stevens, nor any other person, to the knowledge or belief of these defendants, made use of any threats or gave any intimation that he would put down the fare on the steamboats, if the stockholders did not accede to his request, or any other request, so low that the company could not compete, &c., or did, or said, or intimated anything of that purport to induce him to sell them the said stock ; and they deny, in manner aforesaid, that the company or the stockholders were compelled, for fear of being broken down, to accede to any demand of said Stevens, or to let him have the control of said company.

The defendants answering as aforesaid, say that, until May 16th, 1831, there were no directors in any manner chosen or appointed ; and that on that day, the complainant being present and acting therein, Miles C. Smith, George Abbe, Edwin A. Stevens, Isaac Fisher, and James Neilson were unanimously chosen the first directors, and at a meeting of the directors, held the same day, Miles C. Smith was chosen president, and Abraham S. Neilson appointed treasurer, and John D. Hager, the complainant, appointed secretary of the company for the ensuing year.

The defendants answering as aforesaid say, that the persons then in charge of the business of receiving and delivering freight and collecting the earnings, and the officers of the steamboats and the other vessels of the company, were continued by the directors in the performance of their duties, under the frequent personal superintendence of the president and directors, or some of them ; and that, though there were frequent conferences between

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the president and directors in relation to the management of the business, no formal meeting was necessary, or was held, until October 29th of that year, when the accounts and business for the six months then past were subjected to examination, and a dividend declared, as is alleged in the bill, out of the earnings of the company; and thereafter, on the 16th of June, 1832, a further dividend of \$15 on a share was declared and paid to the stockholders; and afterwards, on the 15th of February, 1833, as is alleged in the bill, a dividend of \$55 on a share was declared and paid.

The defendants, answering as aforesaid, say that until May, 1834, \$125 only on each share of stock had been paid, making \$25,000 of capital, wherewith the business of the company had been carried on, and that, in the expectation of an increase of business, and the necessity which at or about that time arose for increasing the facilities for transporting it, it was deemed desirable by the stockholders and directors that a further sum should be paid in on their stock, to increase the capital of the company; that an opportunity was also presented to unite the business of another transportation line, doing a similar business, under the name of the Union Transportation Line, between New York and Philadelphia, with the business of said company, which said line had been superintended in New York and Philadelphia by the firm of Hill, Fish & Abbe, composed of David S. Hill, Benjamin Fish and George Abbe; and thereupon, and with the design of effecting such union, and increasing the capital without requiring the then stockholders to contribute any more money to the capital stock, a meeting of the stockholders of the company was regularly convened on the 17th of May, 1834, and a proposition was made and agreed to, which is set forth in the bill.

The defendants admit that, in pursuance of that proposition and agreement, the said E. A. Stevens, at a meeting of the said stockholders, on the fifth of December thereafter, (1834,) made the report set forth in the bill, and that the recommendation therein contained was signed; and they say that the same was complied with by the several stockholders, by the transfer of the said 100 shares of the stock therein referred to; and thereupon, and therefor, the sum of \$25,000 was paid in on the stock

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of the company, as and for an installment of \$125 on each share, by the said Hill, Fish & Abbe, and others, the purchasers thereof; and thereby the capital wherewith to carry on the business of the company was increased to \$50,000.

The defendants, answering in manner aforesaid, say that the said line called the Union Transportation Line was theretofore conducted by said Hill, Fish & Abbe, and others, from New York to South Amboy, and thence across the state, over the Camden and Amboy Railroad, and thence to Philadelphia on the Delaware river, in such wise that the Camden and Amboy Railroad Co. participated in the advantages thereof; that there was not then, and had not been since the spring of 1831, any such line as the Union Line in existence, under the control or direction of said Stevens, or otherwise, the same having ceased to exist, and the stockholders therein united with the New Brunswick Co. in the spring of 1831 as before stated; that it was the design and object of the above-mentioned sale of the said 100 shares of stock to increase the business, patronage and influence of the said company, and bring in the business of the said Union Transportation Line; and that it was for that purpose that the complainant and the other stockholders making that sale, sold and transferred their said stock to the said persons above named; and that there was no exclusion, actual or designed, by Stevens, in regard thereto, of any person, for any purpose, or for concealing the business of the company, or any information of said business from any person interested therein, or who was entitled to know anything in regard thereto; that they believe and admit that the persons named in that behalf in the bill became purchasers and received transfers of some part of said 100 shares of stock, and, with the exception of the said Philip Kipp and such persons as are therein alleged to be connected with the Union Line, they were severally connected with the lines and companies in the bill in that behalf stated; but as to the said persons above excepted, these defendants deny the allegation in that behalf made in the bill.

The defendants, in regard to such of the statements of the bill regarding the said 100 shares of stock, or in regard to any other of the transactions of the company, or the management of its

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affairs, as import or intend that said Stevens acted according to his own will and pleasure, or otherwise in any manner independent of the stockholders or board of directors, and without their authority, direction or approval, say that the bill is false and untrue. But that on the contrary, so far as he had any agency in the sale of said stock, he acted by the express authority and with the full knowledge, acquiescence and approbation of the stockholders, including the complainant; and that all his agency for the company, and his superintendence and assistance in the conduct of its business has been at all times by the authority of the directors and with their sanction and approbation.

The defendants admit that at a meeting of the directors of the Camden and Amboy Railroad Co., held at Bordentown, Oct. 13th, 1834, (and not on the 20th, as stated in the bill,) the resolution in that behalf stated in the bill was passed; and though they have no recollection of the precise day on which notice of said resolution was communicated to the directors of the New Brunswick Co., it may be true, though at this remote day they cannot either admit or deny that the said resolution was not communicated until March 3d, 1835, the day in that behalf stated in the bill; nor can they now state what reasons induced the directors of the Camden and Amboy Railroad Co. to withhold the same; but they admit that the same was communicated to the defendant, E. A. Stevens, by this defendant, Jas. Neilson, and by said Stevens laid before the said board of directors of the New Brunswick Co., and entered on the minutes of their proceedings by J. D. Hager as secretary, as was his duty to do. Whether this defendant, Stevens, or any others of the directors, requested the said secretary to make such entry, the defendants are wholly unable to state.

They admit that at a meeting of the directors on the 25th of August, 1835, the resolution appointing Henry R. Swan agent, was passed, and they say that Hager was present and recorded said resolution. They admit that on the 16th of January, 1836, at a meeting of the board of directors, at which meeting Hager was present, as well as the directors in that behalf named in the bill, the proceedings were read and the entries made in the book of minutes by the complainant, as is alleged in the bill; and they

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admit that the said sum of \$9706.46, in the said account mentioned, was received through the said Swan, and in whole or in part received by him from the firm of Hill, Fish & Abbe, for the freight received for goods transported from New York to Philadelphia for the year 1835, which were in whole or in part, transported across New Jersey on the Camden and Amboy Railroad; whether the whole of said sum was received from said firm, or whether the whole thereof was received for goods which passed over said road, these defendants are ignorant and cannot set forth; but according to their best recollection, it embraced also canal and steamboat transportation; but they say that said sum was not received, nor any part of it, so far as they have any information and as they believe, for transportation by railroad exclusively, separate or distinct from steamboat transportation.

They say it is not true, as stated in the bill, that there is no agreement with the firm of Hill, Fish & Abbe entered on the minutes of the board of directors, under the date of December 29th, 1834; but that at a meeting of the board on that day, at which the complainant was present and recorded the proceedings, a resolution was passed, which was communicated to Hill, Fish & Abbe, and assented to by them, and so became an agreement with them in the words following: "*Resolved*, That the directors of the New Jersey Steamboat and Canal Transportation Co. offer Messrs. Hill, Fish & Abbe one-eighth of the net proceeds of the transportation business, to conduct said business on account of said company on and after January 1st, 1835;" which resolution was duly entered by the complainant on the book of minutes of the proceedings of the stockholders and directors of the company.

The defendants admit and say that at a meeting of the board of directors on the said 4th of May, 1836, at which the complainant was present recording the proceedings, the two resolutions in that behalf stated in the bill were passed, and were entered by the complainant in the aforesaid book of minutes; and they admit and say that prior to the said May 4th, 1836, Hill, Fish & Abbe had received a share of the receipts for the transportation of merchandise only, between New York and Philadelphia, partly

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in the boats of said company, and partly across New Jersey over the said railroad, and partly through the Delaware and Raritan Canal, and conducted the said business under the aforesaid resolution of December 29th, 1834; and the resolutions last above mentioned were passed and intended to reduce the allowance to the said firm of Hill, Fish & Abbe, and increase the actual income of the company for the benefit of the stockholders. They do not deny that the board of directors recognized and assented to the said resolution of the Camden and Amboy Railroad Co., and they admit that Neilson and Stevens were present at the board and voted for the said resolution.

They say that the said arrangement with the Camden and Amboy Railroad Co. was only auxiliary to the main business of the New Brunswick Co., and was intended to facilitate, and did greatly facilitate, the transportation of a portion of the goods entrusted to the said company, across New Jersey, when an expeditious carriage and an early delivery was desired, while the water carriage was still conducted on their own boats, through the said canal, and the said arrangement was, in fact, advantageous to the company, and yielded them an increased income, and the same and the business so done as aforesaid was at all times well known to the complainant, who was in the actual employment of the company, on board of one of their steamboats, and was acquiesced in by him, and was well known and fully acquiesced in by all the other stockholders, without a word or intimation of any objection thereto from any person, (so far as these defendants have ever known or heard,) so long as such business was continued, and until a few days before the filing of the complainant's bill.

And they say that the company did not pay out, for the purposes of the business done under the said arrangement, so much as the amount of the receipts thereof; but that a balance of net profits accrued to the company therefrom, from year to year, which was divided to and received by the stockholders, or applied to the purchase of boats and other property of the company, and a portion thereof was reserved as a fund to provide for the large risks incident to the business in which they were engaged; and that all the moneys received by the said Fish & Abbe, or by Hill,

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Fish & Abbe, for their services in conducting the business, were parcel of the receipts and profits accruing from the same business. And the defendants submit that the arrangement aforesaid, and the business done as aforesaid, under it, as auxiliaries to the main business of the company, which was done and continued by steamboats, barges and other vessels, from the cities of New York and Philadelphia, on the waters of the Delaware and Raritan, and the Kills and bay leading to New York, and through the Delaware and Raritan canal, were not unauthorized by the charter of the company; and that neither Stevens, nor Neilson, nor any of the officers or directors of the company committed any breach of trust or violation of their duty as directors or otherwise in regard thereto. And they say that if, by any means, such arrangement and the business done under it, so far as it embraced the use of the said railroad for any part of their said transportation, would be deemed to exceed the powers conferred by the act of incorporation, (which they do not believe or admit,) the same was, in fact, terminated in the spring of 1846, and until then, was continued with the full knowledge, acquiescence and approbation of the complainant and all other stockholders of the company, and yielded an actual profit and income which, though the same was small in amount towards the termination of said business, was actually divided to and received by the complainant and the said other stockholders; and they submit, that it is neither just, equitable nor competent for the complainant to allege the said arrangement and the business done as aforesaid, against the directors or any of them, after acquiescing and personally aiding therein, and receiving the profits thereof for ten years.

The defendants, in manner aforesaid, say that the said arrangements were made and business done in good faith, so far as they acted therein or consented thereto, and, as they believed, on the part of all the said directors, and with the only design to promote the interests of said transportation company and the stockholders therein; and that the business of the Union Transportation Line was well known to the complainant and the other stockholders who contributed and made up the said 100 shares of stock sold as aforesaid, at the time of such sale.

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They admit that when the said resolutions of the Camden and Amboy Railroad Co. were passed, Stevens was a director and active superintendent of the affairs of that company, and that James Neilson was a director and treasurer of the Delaware and Raritan Canal Co., and a stockholder therein, and that the stock of the last-named two companies had been consolidated, as in bill alleged.

They deny that, after the said transfer of the 100 shares to Hill, Fish, and Abbe and others, (which was done through said Stevens as attorney, as above stated,) Stevens either had, or claimed to have, or assumed the control of the company, or was, by the means in the bill stated, or any other means, enabled to elect such directors as he thought proper, or that he did then, or has at any time since, controlled or continued to control the action of the company to suit his own views and purposes, but, in denial of the statements in that behalf made in the bill, say that, at and before such sale and transfer, E. A. Stevens and his brother, Robert L., under the firm and name of R. L. & E. A. Stevens, held and owned one full half of the stock, and, for a time previously, a majority of the stock, and, by the said sale and transfer, their stock was reduced to 50 shares; that his brother, J. C. Stevens, never owned more than four shares; that the directors have been chosen by the stockholders, without any direct or indirect control of said Stevens, and that, in the only instances in which the annual election was not held, the meeting of the stockholders therefor had been duly convened by notice, according to the provisions of the act of incorporation, and that the stockholders—the complainant being present, and acting—voluntarily adjourned, without making the election—E. A. Stevens being absent, and in no wise interfering therewith, directing or controlling the same.

They deny that E. A. Stevens, after he and his associates were appointed directors, took the said business from the Union Transportation Line, above referred to, and gave it to the said company, or appointed the said Fish and Abbe agents, or caused them to be appointed, as in the bill is stated, but they admit and state, that the business of the said line was secured to the company in the manner before stated, and that the arrangements

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therefor were known to the stockholders, they selling and transferring a portion of their stock, as aforesaid, and more fully accomplished by the action of the board of directors, of whom E. A. Stevens was one, and that said E. A. Stevens had no control or agency therein, except such authority and direction as was given to him by the stockholders and directors, and in entire subordination to them, and that, in fact, there was no change made in the directors from the first election of directors, in 1831, to the year 1838, but the directors were selected by the stockholders—Hager being present at every election, except that of 1831—by unanimous vote, as they believe.

They admit that, on the 30th of December, 1836, at a meeting of the directors, the resolutions were passed which are in the bill set forth, in relation to the sale of the barges to Buckman, and other matters in said resolutions specified, as stated in the bill, at which meeting Hager was present, and recorded the proceedings.

They admit and say, that on the 1st of February, 1837—not 1st of January in that year, as stated in the bill—an arrangement was made by the directors, and consummated by their agent, H. R. Swan—and not made by E. A. Stevens, in any manner independent of the board of directors, or acting otherwise than as one of the board, or by their authority—with Miller & Bancker, of New York, and C. F. King & Co., of Philadelphia, who were, heretofore, associated under the assumed name of “The Merchants’ Line,” for the purpose of, and engaged in the business of transporting merchandise between those cities, the nature and particulars of which fully appear by the resolutions which are entered in the book of minutes of the said company, dated February 1st, 1837, which are set forth in the bill, all of which were assented to by the board of directors, as was then well known to the complainant, by whom the same were recorded in said book of minutes.

They say they admit that a meeting of the board was held at Spotswood, on the 23d of January, 1838, and say that E. A. Stevens, J. Neilson, I. Fisher, and Smith, the president, and the complainant, then secretary, were present, and that the accounts of the treasurer were examined, and were, as the board were

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then fully satisfied, and as the defendants now fully believe, found correct in every respect; and thereupon it was resolved, that the receipts and expenditures be entered in the book of minutes of the secretary, and the same were entered by the complainant, in the manner stated in the bill; and the resolution declaring a dividend of \$40 a share, payable February 1st, 1838, (and not 1835,) was thereupon passed by the said board; and a committee was also thereupon appointed to examine the books of the company, which contained the accounts of all their dealings, and the accounts of their agents, and report thereon. And the defendant Stevens, of his own knowledge, Neilson, upon the best of his recollection, and Thomson, upon information he believes to be true, deny that Stevens had any agency whatever in preparing, procuring or delivering the said alleged statement to the said board of directors, or to the said secretary, or had any other agency in relation thereto, otherwise than by examining the said accounts with the said other directors, and as a director uniting in said resolution.

And they say that the complainant, during said years 1836 and 1837, was in the employment of the company, on board the Napoleon, and the receiving and collecting clerk, and that the earnings of the said boat were collected by him, and paid over (so far as he has ever accounted for and paid over the same,) to the treasurer of the company, and the receipts of the treasurer taken by him therefor; and that the said earnings were entered in a book kept by complainant, in which the amount thereof at all times appeared, which book remained in the possession of the complainant, and these defendants believe still remains in his possession; and that the complainant, when he entered the said alleged statement, well knew the actual amount of the earnings of the said boat during the said two years.

They say that, at the said meeting, the said amounts which are entered in the minutes, were not taken from any statement prepared or furnished to the said board, or the secretary, but that the books and accounts of the treasurer were produced to the directors, the complainant being present, and were audited and examined by the said board, and the result of such examination was taken down, to be entered in said book of minutes by the

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said secretary ; and that the actual amount of the receipts of the said treasurer for 1837 was \$40,808.37, and the actual amount of disbursements for the said year 1837 was \$27,562.10, being the precise amounts entered in the said minutes, and the same did not include the receipts or disbursements of 1836, the accounts of which last-named year had been stated, and a dividend therefrom had been declared, at a meeting of the directors in December of the last-named year, the minutes whereof are entered in the said book, and signed by the complainant.

They say the complainant well knew that the aforesaid amounts were the true amounts ascertained by the aforesaid examination of the books of the treasurer, but that he erroneously entered the same, in his said book of minutes, as the earnings and disbursements of the Napoleon for the years 1836 and 1837, instead of entering the same as the receipts and disbursements of the treasurer, appearing on his said books, for the year 1837 alone, as the same truly were, and as they ought to have been entered ; and they say that all the net earnings of the Napoleon have, in fact, been divided to and received by the stockholders.

They admit that the persons in that behalf in the bill mentioned were regularly elected directors on the 7th of May, 1838 ; and that Ira Bliss then was and still is the agent of the Camden and Amboy Railroad Co. ; and they say that said Bliss was then a man of mature years, of experience in the business of transportation, and of high integrity, and in all respects a suitable person for a director.

And they not only deny that there has never been any election of directors by the stockholders since the day last mentioned, but say that a meeting of the said stockholders has been held on the first Monday of May in every year since, and that at each of said meetings five directors have been chosen by the said stockholders for the year then next ensuing.

They admit and say, on the best of their information, and as they severally believe, that the "other persons" alluded to in the report submitted to the stockholders by E. A. Stevens, at their meeting on the 5th of December, 1834, in the bill mentioned, were the several persons, other than the members of the firm of Hill, Fish & Abbe, to whom the 100 shares were sold and trans-

ferred ; and that the same were sold and transferred to the said several persons by the direction of the stockholders, and to carry out the purposes for which, as hereinbefore stated, the said agreement and sale were made ; and that among those persons were Robert F. Stockton, John Potter, John R. Thomson and J. C. Stevens, but not Robert L. Stevens, and that besides the above named there were fifteen others to whom said stock was sold and transferred.

They admit that said R. L. Stevens, R. F. Stockton, John Potter, J. R. Thomson and J. C. Stevens, together with James Neilson and B. Fish, were at the time directors in one or the other of the two joint companies mentioned in the bill ; but they deny that the said persons controlled the management or concerns of the said companies, or either owned or controlled a majority of the stock of said companies.

They admit that prior to 1839, the stock of the said Transportation Co. was held and owned by the several persons named in Schedule 1, annexed to the bill, and that a considerable number of the shares of said stock not held by the persons above particularly named, were held by the agents, engineers, clerks, or persons interested in the joint companies.

The defendants, Stevens and Neilson, of their own knowledge, and Thomson as before, say and admit that the complainant was appointed secretary as stated in the bill, and continued and acted as such until April, 1839, and was fully aware of all the proceedings of the stockholders and directors, and in no instance, as far as they know or have ever heard, made any complaint, or expressed or intimated any dissatisfaction or objection in relation thereto. But the complainant was not continued in that office after the annual election on the 6th of May, 1839, and did not act as such ; but the board, from time to time, appointed a secretary *pro tem.*, and afterwards appointed Abraham S. Neilson secretary of the company, and he has been continued in that office by the said directors, and is now the secretary of the company.

They admit that after the complainant ceased to be secretary, M. C. Smith, who has been president since the first organization of the company, called on the complainant for the book of min-

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utes ; they have no knowledge or information of the conversation which then passed between the president and complainant, except from the bill ; but they say the complainant was in no wise entitled to hold or retain the said book, his office of secretary having terminated ; and they admit that he believed that said book would not be returned to him ; but they deny that said book was wanted by or for E. A. Stevens, and deny that the same, or the alleged copy thereof, was ever delivered to said Stevens, or has ever been in his possession or custody ; and they deny that the complainant is now, or has been since the first Monday in May, 1839, the secretary of the company.

They admit that the complainant has not since that time been requested to attend any meeting of the board as secretary ; but they deny that the reason therefor is, or that it is true, that E. A. Stevens manages, controls and directs, or ever has, the business of the company at his will and pleasure or otherwise, except so far as his office as a director required him to do, and so far as the superintendence and agency in assisting therein was entrusted to him by the stockholders and the board, and then at all times in strict subordination to them, as above stated ; and they deny that when the directors or any of them are called together, it is only, or in any sense, a matter of form, or to ratify what he has done or determined to do, or because he wishes to keep secret the proceedings of the company.

They say that the book delivered by the complainant to the president was by them believed to be the original book of minutes and treated as such, and the minutes of the meetings of the stockholders and directors have been entered therein.

They deny that E. A. Stevens has had the management or control of the company, or has expended or caused to be expended any moneys without the order or sanction of the board of directors, or for any purposes wholly foreign to the objects of the company or auxiliary thereto, or that any moneys have been expended or caused to be expended by him without rendering a full account thereof to the treasurer and board of directors ; although it is true that the accounts of the daily business of the company and their receipts and payments are not and never have been kept in the book of minutes of the proceedings of the meet-

ings of said board ; but the same are regularly entered in the books of the treasurer and receiving and forwarding agents of the company, at all times, under the supervision and open to the examination of the president and directors.

They deny that the said four iron steamboats bought from R. F. Stockton, in the bill mentioned, were purchased by E. A. Stevens ; but they admit and say that the board of directors purchased the same from R. F. Stockton, at the price in the bill named, which these defendants then believed and now believe to have been their fair value at that time ; and although it is true that said R. F. Stockton was at that time a director in the company, it is not true that he acted as such director, in any manner, in ordering, directing, or making such purchase. They say that said steamboats were built for the express purpose of being used as canal boats, to be propelled by steam, instead of horse power, and so that, after passing through the canal, they could continue to their destination without any addition or change of power ; and that they were in good faith bought by the said directors to be used, and were used for the carrying on their said transportation business, through the Delaware and Raritan canal, to and from Philadelphia ; and the same were bought in good faith, and in the exercise of their best judgment, to carry on the legitimate and proper business of said company.

They deny that either Stevens or the said directors have at any time, since the organization of the company, bought any schooners ; and, denying that Stevens in any manner, independent of, or without the authority of the said directors, bought or built the canal boats next herein admitted, they admit that the board of directors built the steamboat Raritan, and built another iron canal boat, called the Mars, to be towed through the canal, but which was not a steamboat, and fifteen canal boats, and sixteen coal canal boats, (which canal boats are often called barges, as designated in the bill,) and at or about the prices in the bill named, and also bought the steamboat Hornet, as therein alleged ; and they admit and say, that the three vessels called the Porpoise, Delaware, and Whale, were not purchased by E. A. Stevens, but were built by the said directors, at or about the price alleged in the bill ; but they say that, when so built, the

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three last-named vessels were and still are canal boats, and that after they had been for many years used as mere canal boats, without sails, the said directors caused sails and rigging to be added to them, for the purpose of enabling them, after they had been towed through the canal, to pursue their voyage without the expense of other propelling power.

They admit, and say that, prior to April 1st, 1846, the Delaware, Porpoise, and Whale were used during the winter, and while the canal navigation was interrupted, and, so far as they recollect, during that period only, in carrying freight between South Amboy and New York, by the authority and consent of said directors, of whom E. A. Stevens was one; and that since April 1st, 1846, two of said three canal boats last mentioned have been employed in carrying freight between South Amboy and New York, by the like consent and authority; but, in all cases, only when the navigation through the canal was obstructed as aforesaid, and that upon charter, and on full compensation therefor to the company. And they deny that the said three boats were bought or built to enable said Stevens to carry into effect any contract with the Camden and Amboy Railroad Co. in the bill mentioned or referred to, or any other contract with said railroad company.

They deny that said Stevens, or the said directors, or any of them, have caused the said iron steamboats, or any of them, to be employed in the transportation of goods or merchandise between Philadelphia and Hartford; but they admit that the said directors did, for a short time, authorize the said steamboats to be so employed between Philadelphia and Albany, in or about the summer of 1844; and they say that the said running of said boats was authorized in good faith, in aid of the general object of the charter, and not in violation thereof; and the same and the aforesaid employment of the Delaware, Porpoise, and Whale were well known to the complainant and the other stockholders, and no objection thereto made or intimated, as far as they have ever heard or known, until the filing of the bill.

They say that at or before the original subscription to the stock of the company, the complainant and his said associates making such subscription, or some of them, bought for the use

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of the company, a sloop called the James Bennet, and invested a portion of the capital therein, and the same was, by the approbation of the complainant and the other stockholders, employed in the transportation business of the company for several years; and they say that neither the employment of the said three above-named canal boats fitted with sails, nor the addition of sails thereto, was, as they are advised and believe, any breach of trust, or violation of the charter.

They say it is not true that said E. A. Stevens bought or caused to be bought, with the funds of the said transportation company, any real estate in Philadelphia, and caused the title thereto to be vested in one of his brothers, or that he has been guilty of any breach of trust in relation to the Walnut street property, or any violation of his duty as a director of the company, and they say, Stevens of his own knowledge, and Neilson and Thomson partly on their own knowledge, and partly on information they believe to be true, that the property in the bill called the Walnut street property, together with other valuable real estate in Philadelphia, adjacent thereto, was purchased in or about the year 1835, by E. A. Stevens and his brother Robert, for the use and benefit of the Camden and Philadelphia Steamboat Ferry Co., a corporation erected by or under the concurrent acts of the legislatures of New Jersey and Pennsylvania, and not for the use and benefit or with the funds of the said New Brunswick Co., and which said ferry company were and now are largely solvent, and of large responsibility, fully adequate to render the advance made by the said transportation company, on account of the said real estate, secure; and the said real estate was, at the time of the said purchase, conveyed to them, the said R. L. & E. A. Stevens, and the title thereto has been held by them from that time to this; and that the said ferry company then assumed and held the equitable ownership of the said real estate, subject to the payment to the said R. L. & E. A. Stevens of the amount by them paid therefor, or secured to be paid by the bonds secured by mortgages on the said property; and that the said Robert L. & E. A. Stevens had no private individual interest in the said real estate, except for the repayment aforesaid of the discharge of the said bond and mort-

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gages, and have never had any other private individual interest therein from that day to the present time, and have always been willing and ready to have the title, estate and interest in and to the said property applied to the benefit of either the Camden and Philadelphia Steamboat Ferry Co. or the said New Brunswick Co., as it ought in equity and good conscience to be applied; that after the said purchase the said Ferry Co. had and received the rents, income and use of the whole of said real estate, and repaid to the said R. L. & E. A. Stevens the money paid by them, and assumed the payment of the said bonds and mortgages, and the said real estate continued to be so held, owned, used and enjoyed until 1839; that prior to that year it became necessary for the said transportation company to have the use of some stores and offices and water front in Philadelphia for the purposes of their above-mentioned transportation business; and thereupon, and in or about 1837, the said R. L. & E. A. Stevens, by and with the concurrence of the said Ferry Co., permitted the said transportation company to have the use of about one-third of the said real estate, (being the portion thereof which is denominated the Walnut street property,) at a rent of \$2800 per annum; and the said transportation company, by the authority of the directors thereof, took the possession and had the use thereof from that time, at the rent aforesaid, until the spring of 1839; that on the 20th of May, 1839, at a meeting of the directors of the said transportation company, held on that day, the said E. A. Stevens presented a map of the said portion of the said real estate then rented by the said company, and submitted to the said directors the propriety of purchasing the said property, consisting of two stores, a wharf and water lot, at a price not to exceed the capital of the then present rents, viz., \$46,666.66; and it was thereupon, at the same meeting, resolved by the said directors that the said E. A. Stevens be authorized to purchase the said property for the said transportation company, on the terms aforesaid, and that the sums paid from time to time be applied to the payment of the said mortgages on the said property, in which terms the said ferry company acquiesced, and the said sum was afterwards advanced by the said transportation company to effect the object of the said resolution; and the

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said transportation company continued in the use and enjoyment of the said property for the purposes of their said business and of the income and receipts arising therefrom; and thereupon, or shortly thereafter, the said R. L. & E. A. Stevens caused the conveyances to be prepared to vest the legal title to the same in the said last-mentioned company; but before consummating the said contemplated purchase, eminent counsel in Philadelphia was consulted, and the said directors of the said company were advised, and as these defendants verily believe, truly advised, that the said company could not, under the laws of Pennsylvania, hold real estate within that state; in consequence of which advice and belief, the said deeds were never executed and delivered by the said R. L. & E. A. Stevens, but the said amount of the said purchase money had, nevertheless, in good faith, and without any knowledge of the existence of any obstacle to the said purchase, and to secure the necessary and proper use and enjoyment of the said premises for the benefit and advantage of the said transportation company, been applied to the said mortgages thereon. By reason of all which the said transportation company became equitably entitled, either to have the said money refunded to them by the ferry company, or to have and receive the proceeds of the sale of said property whenever the same should be sold; and their equitable rights in this respect were fully recognized by the said ferry company, who permitted them to continue in the use and enjoyment of the said property and of the receipts therefrom, and thereafter, in March, 1846, the agent and superintendent of the ferry company stated an account of the said transaction, by crediting the transportation company the amount of the said advance, with interest thereon, and all payments made by them on account of said property, with interest thereon, and charging them with the rent for the use of the said property and their receipts from the same and interest on such rents and receipts, by which statement it appeared that the balance due said transportation company, according to such statement, was \$43,014.20, which sum is the amount in the bill untruly stated to be or to have been invested in property in Camden, New Jersey. And the said transportation company have not, in fact, so far as these defendants have any knowledge

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or information, any money whatever invested in any property in Camden.

They say that eminent counsel in the State of Pennsylvania did advise the said company that the said property could not be held in trust for the said company, and they say, as to all the statements in the bill in regard to said Walnut street property, and the said sum of \$43,014.20, and in regard to the conversations or admissions of E. A. Stevens, so far as such statements in the bill are inconsistent with the truth of the foregoing allegations in respect thereto, they are false and untrue; and, on the best of their knowledge, information, and belief, they deny that the said property has yielded an annual income of 15 per cent. upon the sum so as aforesaid advanced by the company, or anything near it, or that the said property has in any degree increased in value.

The defendant Stevens says that R. L. Stevens and he are willing, and always have been ready and willing, to convey the said property to the said company, in re-imbursement of the amount so advanced and interest thereon, if they can be or are capable of holding the same, or to any other person in trust for them, if it shall be lawful and proper for them to do so.

The defendants deny any bad faith or breach of trust in relation to said property, and any intention on the part of them or either of them, or of the said E. A. & R. L. Stevens, to appropriate to his own use any increased value of said property, and they have never appropriated to their own use any of the rents, income, or profits thereof.

In regard to the alleged purchase of property in Bristol, Pennsylvania, the defendants say it was conveyed to Benjamin Fish for and on account of a debt due the company by Morris Buckman, the collection of which was very doubtful, and the same was consented to by the board of directors of the said company as the only means of collecting or securing said debt, and upon the undertaking of Fish to account to the said company for the income thereof, and the proceeds thereof, when the same could be advantageously sold, and for no other purpose, and they deny that said E. A. Stevens otherwise purchased the said property, although he acted, in procuring the conveyance, on the be-

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half of the said company, and by the authority and with the concurrence of the directors; and they deny that there was any breach of trust or violation of duty in relation thereto.

They deny that E. A. Stevens, as sole manager, or otherwise, as in the bill is stated, made the loan to himself, in the bill alleged, but they say it has been the practice of the company, from its first organization, to reserve a portion of their earnings or profits, from time to time, to provide for the building or purchase of boats, for the carrying on of their business, as they were required, and also to provide against the very heavy risks necessarily incident to the extensive business in which they were engaged, which, at times, involved the transportation of more than \$100,000,000 worth of goods in a year, and that, out of such reserved earnings, the directors of said company, in or about 1840, did lend to said R. L. & E. A. Stevens, who are both of ample responsibility to render the same secure, the sum of \$14,400.20; but not on their personal security alone. On the contrary, they say that the payment thereof, with interest, was secured by their note and the hypothecation of stock, worth, as these defendants believe, at least fifty per cent. more than the amount of such loan, and the same was regularly entered in the books of account of the treasurer of said company, the proper place for such entry; and they deny that said loan was any breach of trust or violation of duty on their part, or on the part of any of the directors.

The defendants admit that other moneys have, in like manner, been loaned by said directors of said company, to other individuals, amounting to \$12,810.63, but they say that ample security has, at all times, been taken, and held for the re-payment thereof, with interest; and they deny all breach of trust or violation of duty in regard thereto.

They deny that any agreement was entered into by any company or companies, or on their behalf, with the said transportation company, or with any person on the behalf of the said transportation company, that the said transportation company should pay an aggregate yearly sum for transportation on the said canal, as in the bill is stated, or that any similar agreement was made, or of any purport similar to that stated in the bill. On

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the contrary, the said transportation company have always paid tolls upon the said canal, upon each boat, according to the rates agreed upon for that purpose, by them with the canal company.

They admit the said New Brunswick Steamboat and Canal Transportation Co., ever since the commencement of their operations, have done a very profitable business, and that, after the said arrangement by which the business of said Union Transportation Line was secured, the business and profits of said company were very much increased, and the said company continued to do the business of transportation on the said canal and railroad during the period in the bill stated, all of which they say enured to the benefit of the stockholders of the company, and they received the profits.

They admit that the dividends of profits were made on the 15th of February and 4th of December, 1833, which are stated in the bill; and they say that the Napoleon and sloop Bennet were then the only boats employed by said company, and these dividends were for the earnings of said two boats from the spring of 1832 to last-named day; and that, since that time, all and every of the net earnings of the company arising between New York and New Brunswick, have been divided to and received by the stockholders, with all the other net earnings of the business of the company, except such portion as has been invested in boats and other property necessary and proper for the convenient carrying on of their aforesaid large transportation business, or held as a reserved fund, for the purposes before stated, or such sum as now remains in the hands of the treasurer of the company, and the said amount of the said bad debt secured by the said conveyance of the said real estate in Bristol, Pennsylvania, to the said B. Fish; and the accumulation of property in the hands of said company has, by the aforesaid investments, made for the purpose of carrying on its said business, as aforesaid, amounted to upwards of \$200,000.

They say that a meeting of the board of directors of the said company was regularly held on the 18th March, 1846, at which proceedings were had which they believe to be referred to in the bill, but no meeting was held on or about the 30th of January of that year. That J. R. Thomson tendered the re-

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signation of R. F. Stockton as a director of the company, and the following proceedings were had, the president, M. C. Smith, E. A. Stevens, J. R. Thomson and J. Neilson and the secretary, A. S. Neilson, being present. The president declining to preside, J. Neilson was appointed chairman, and Richard Stockton was appointed director, in the place of R. F. Stockton, who was then absent from the United States. The said Richard Stockton took his seat as such director. It was moved that the connection then existing between the Camden and Amboy Railroad Co. and the New Brunswick Steamboat and Canal Transportation Co. be dissolved on and after the 1st of April; which motion was passed, the said Smith declining to vote, and the secretary was directed to enclose such resolution to the directors of the said railroad company, accompanied with the following note:

“Gentlemen—I am directed to enclose to you the following resolution, which has been adopted by the directors of the New Brunswick Steamboat and Canal Transportation Company, and to inform you at the same time, that the motive for discontinuing the connection which has existed for some time with your company, is the inadequacy of the compensation received for doing the business of the transportation on the railroad. This compensation amounts to not more than an insurance on the property carried by us, say \$1 for \$31,000 value, and for which we have been responsible.”

The defendants say the foregoing is a true statement of the proceedings of the said meeting, and the said letter sets forth the true reasons for terminating the connection therein referred to, and that such termination was made in good faith and in the exercise of the best discretion of the said directors and for the best interest of the said company, and without any sinister or other motive whatever than above stated.

And they deny all the statements in the bill inconsistent with the truth of the foregoing statement, and deny that there was any design or intention on the part of the said directors, or the said E. A. Stevens, to take, or that the said E. A. Stevens did, in fact, take any business from the said company in any other manner or with any other motive than is above stated; or that

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he has given the said business to any other company whatever ; or that he has caused the said business to be done otherwise than so far as, after the termination of the said connection, he, as a director and agent of the said railroad company, was required to conduct or superintend the same. And they say that the said "Union Transportation Line" is the name under which the freighting business has been conducted on the said railroad by the said railroad company.

The defendants admit that the form of receipts for goods given by the said company, was used and continued as stated in the bill, and that upon and after the dissolution of the said connection, the words "New Brunswick Canal and Steamboat Transportation Company Proprietors" were no longer used for goods carried on the said railroad ; and they say that the said words were not used for the single and only reason that such last-mentioned company had no longer any interest in such business and was in no wise responsible therefor.

They say that the bill, so far as it alleges that E. A. Stevens has had any other agency in the said transaction regarding the dissolution of the said connection and the subsequent conduct of the said business than is hereinbefore stated, and so far as it imputes to him any private motive or interest not above expressed, and so far as it states that the last-named company has any claim to the business or any earnings thereof, is wholly false and untrue.

They admit that said board of directors, of whom said Stevens was one, but not that said Stevens individually had, within the period of eight or nine years, expended or invested a large sum of money in the building and purchasing the above-mentioned steamboats, iron propellers, freight barges or canal boats, and coal barges, and one dock or wharf at Perth Amboy, and a store-house at New Brunswick, and other property, for the purposes in the bill in that behalf mentioned ; and that the amount thereof is, as they believe, not widely different from the sum of \$200,000, as in the bill stated.

But they deny that the act dissolving the said arrangement with the Camden and Amboy Railroad Co. was any breach of trust, or violation of their duty as directors as aforesaid, or was

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done otherwise than for the best interest of the stockholders in the said transportation company.

They further deny that said Stevens has had or received any earnings of the steamboat Napoleon, or of the steamboat Raritan, or that such earnings have passed through his hands, or that he has kept the accounts thereof, or that he has had or received or kept the accounts of the earnings of the two boats, called schooners in the bill, or of the earnings of the iron steam propellers, or of the freight or coal barges in the bill mentioned, or of the earnings of the Union Transportation Line. And they deny that said Stevens has had or received any earnings whatever of or from any of the business of the company, or had any account thereof, which he has not fully accounted for to the said treasurer and board of directors.

They say they have no knowledge or information, save by the bill, and they do not believe that there have in any manner accrued, in any part of the business of said company, either in the particulars in that behalf mentioned in the bill, or in any other parts of their business, any earnings, income or profits of any kind or description, which have not been fully accounted for to the treasurer and board of directors, and paid over according to their direction, in good faith, and either divided among the stockholders or invested or reserved, as before stated.

They deny that any freight cars, for the purpose of transporting freight on the Camden and Amboy Railroad, have been purchased at any time by said E. A. Stevens, or by the board of directors, or with the funds of the said company, or by any agent or employer of the company, or other person, for or on account of the company.

And in regard to the alleged rent of the property called the Walnut street property, in Philadelphia, they say the same was in the actual use and occupation of the said company, and that they were charged with the rent thereof down to the time of the stating of the aforesaid account thereof, and allowed interest, as before stated, and that since that time the rents have been received by the Camden and Philadelphia Steamboat Ferry Company, who are now in the receipt thereof; and they are ignorant and cannot set forth the amount of rent the said property pro-

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duces, but they say that, so far as they have any information, and as they believe, the same doth not yield a rent of \$6000 per annum, nor any amount near that sum.

They say that Wm. Anderson is the book-keeper of the company in New York, entering the returns from the various agents in charge of the business of receiving and delivering goods in that city; and that Wm. H. Gatzmer is the agent of the company in Philadelphia, in charge of a portion only of the business of receiving coal in that city, and returning the vouchers and accounts thereof to the treasurer; and that they keep their proper books of account of the transactions done, which books the defendants admit are now in their possession, but are not in the possession of the said A. Decker or Wm. S. Freeman; and they say that other books of account are kept on board the steamboat running between New Brunswick and New York, by the clerk thereof; and that, during the various years of the operations of the company, the other agents in New York and Philadelphia have kept their own proper books of account of all the business done in those cities by or with them as such agents, and returned an account of such business, with the bills and vouchers thereof, to be entered in the books of the company in the hands of the said Anderson; and that all other books of account are kept, and have been kept, by the treasurer, at his office in New Brunswick; and all of the said company's books of account have been, from time to time, submitted to the directors of the company, and have been, at all times, open to their inspection and examination. And they deny that the said book of minutes, in the bill mentioned, is now, or ever has been, in the possession, custody or keeping of the said E. A. Stevens.

As to the amounts of the said earnings of the respective boats, vessels and lines conducting the business of said company, they cannot state whether they amount to the various sums in that behalf alleged in the bill, from the year 1836 to this time, but they admit that the amounts of such earnings have been great; and they say they have all been duly accounted for and divided to and among the stockholders, invested, expended or reserved in manner above stated; and that, over and above the current expenses of the company, there has been actually paid, since 1836,

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for dividends, the sum of \$96,000, and the amount accumulated and now belonging to the company, invested in steamboats, canal boats, and other property purchased in good faith for the carrying on of their business, together with their aforesaid reserved or surplus fund, amounts to more than four times the capital of the said company.

As to the alleged concealment of the aforesaid books of account of the business of the company, or any orders or directions to have the same concealed, or any efforts made by the stockholders, or any of them, to see or have an opportunity to examine said books, the defendants Neilson and Thomson have made no such concealment, nor given any such orders, nor received any such application, nor had the custody or keeping of such books of account, nor had any information of any such orders, concealment or directions; and the defendant Stevens, for himself, says that he has never had the said books of account in his possession, keeping or custody, the same being, at all times, in the hands of the proper agents, treasurer and other officers of said company; that he has never given any orders or directions to such agents, treasurer or other officers to conceal the said books, or to keep the same concealed from the stockholders, or from any of them; and that it is not true that he has been repeatedly called upon by the complainant, or by other stockholders, to permit them to see the books of the company.

That, according to his best recollection, and as he verily believes, the only stockholder who has ever, prior to the 18th of March, 1847, applied to him, or to any other agent or officer of the company, to see the books of the company, was James Bishop, senior, now deceased, about three or four years since, whose object, as understood by this defendant, E. A. Stevens, was to learn the value of his interest in said company as a stockholder, and in two conversations made such request; this defendant stated to said Bishop his opinion that it was important to the interest of the stockholders that the business of the company and the profits of the business should not be made public, and the interests of the stockholders be prejudiced by the competition which would thereby be attracted, and in good faith, and with the only desire to benefit the stockholders and promote their common interests,

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gave said Bishop his reasons for such opinion, which were as hereinafter more particularly stated.

That, though it is true that said Stevens did not exhibit to said Bishop the books of the company, or give any orders or directions to the clerks, agents, book-keepers or treasurer of the company to exhibit the same to him for his inspection, this defendant did not refuse to allow him to inspect or examine them, but gave to him such information and explanations that he declared himself perfectly satisfied, and, so far as he, Stevens, has ever known or heard, the said Bishop was perfectly satisfied, and so continued to the time of his death; and as to any refusal by him, Stevens, to give the complainant any account or information as to the mode or manner in which the affairs of the company are or have been conducted, and as to any calls made upon him, or upon any other officer or agent of the company by the complainant, or any other stockholder or stockholders, to see and have an opportunity to examine the books of said company, either in the possession of said Anderson, or the said treasurer, or of any other agent or officer of the company, or the said book of minutes, none of which were or have been in the possession or custody of said Stevens.

Stevens says he has no knowledge, information or recollection, and does not believe that, prior to said March 18th, any such call or request was ever made on him or any other agent or officer, by the complainant or any other stockholder not being a director of the company, and that the only application or applications made to him by complainant, prior to the day last mentioned, for information in regard to the affairs of the company, were for this defendant's appraisal of the value of the property of the company, consisting of steamboats, iron propellers, canal boats, and other property of the company, and a statement founded upon such appraisal of all the assets and liabilities of the company, to enable the complainant to sell his stock in the company, as hereinafter stated, and under the circumstances following, viz.: at or about April 1st, 1846, James Bishop, Jr., a stockholder, called on the defendant E. A. Stevens, and stated to him that he, Bishop, wished to sell his stock in the said company, and with that object, and for that purpose, wished to learn from this de-

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defendant what was its then value; and the defendant, from a desire to oblige Bishop, and aid him in making a just estimate, prepared in good faith, and according to the best information he possessed or could obtain, and according to his best judgment, this defendant's appraisal of the property of the company, and a statement founded thereon of the assets and liabilities of the company, so as to show the value of the stock; and this defendant is informed, and verily believes, that a similar appraisal, statement, and estimate was, without any concert or communication with this defendant, E. A. Stevens, prepared by M. C. Smith, the president, in connection with one or more of the stockholders, which said statements and estimates were found by said Bishop very nearly to agree in their results; and thereupon this defendant, E. A. Stevens, consented to purchase the stock of said Bishop, such purchase to be for the company, if the board of directors should deem it expedient and for the interest of the stockholders to take the same, and if not, then for the private account of this defendant, and did purchase the same accordingly; and the said appraisals and estimates so made, and the said sale, were communicated to the complainant, who, thereafter, saw this defendant, and requested him to buy his, the complainant's, stock, at the same price, which this defendant declined, and stated to him that it had been suggested that his aforesaid estimate and statement was, in some respects, inaccurate; upon which, the complainant requested this defendant to revise his aforesaid estimates and appraisals, and prepare a new statement for him; which this defendant consented to do as soon as his leisure would permit; and thereafter, on or about March 12th, 1847, the complainant called on this defendant, at his private residence at Hoboken, before this defendant had been able to revise or re-examine the said statement, and urged this defendant to buy his said stock at the price aforesaid; and on several occasions the complainant saw this defendant, and made the like request; and in one instance, in company with Laurence Fisher, another stockholder, who also expressed a desire to sell his stock. And, so far as this defendant then had any intimation, or believed, or now believes, the refusal of this defendant to buy the stock of the complainant was the only subject or occasion of dis-

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satisfaction on the part of the complainant. And this defendant denies that said Bishop, junior, or the complainant, or the said Fisher, or any other of the stockholders, have made any request to see the said books of the company, or asked any other information of the affairs or business of the company, or of the manner in which the same were conducted, except as above stated.

The defendants admit and say, that said Stevens has frequently, in conversations with the stockholders, or some of them, and as they believe in his said conversations with said Bishop, senior, expressed his strong desire that the business of the company and the profits thereof should not be made public, and for the reasons then and often before and since given, that it would invite competition, and so prejudice the interests of the stockholders; and that, in the peculiar business in which they were engaged, it was especially important, and had been found essential to success in the business, by all steamboat and transportation companies; and such was in fact his opinion, in good faith, without any concealment or deceit; and, so far as he ever knew or believed, until the filing of the bill, all the stockholders concurred; and he says that, otherwise than so far forth as he entertained and expressed the said opinion, he has never expressed any unwillingness to have any of the affairs of the company, or books of account, or proceedings examined by any person, or to give any person any information in relation thereto in his power. And he says that, so far as he has had any agency, management, or superintendence of the affairs of the company, the same has always been fully accounted for to the board of directors, and the business so done regularly entered in the books of the company.

The defendants, in relation to the alleged call made on Stevens on the 18th of March, 1847, say it is not true that Stevens stated to the complainant that he, Stevens, managed the company as a close corporation, and should not give any statements of the earnings or profits of the company to the complainant. But, on the contrary, Stevens, being in attendance at New Brunswick upon a meeting of the directors held that day, stated distinctly to the complainant, and to other stockholders then present, that he would cause a meeting of all the stockholders of the company

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to be called within a few days, and that at such meeting all the books of the company, and all the accounts of the business of the company, from the first, would be laid before the stockholders for their examination, and thereupon, and without any notice of any application by the complainant to this court, or of any intention on the part of the complainant to make such application, a meeting of the stockholders of the company was called by the secretary of the company, by authority of the said directors, to be held at New Brunswick, on the 3d of April, 1847. And for the purpose of facilitating the full and satisfactory examination of the said books of the accounts of the business of the company, and the property thereof, and all the earnings, dividends and profits arising therefrom, the said directors, without any notice as aforesaid, caused full and accurate abstracts to be made up from the said books of the book-keepers in the employment of the company, showing the assets and property of the company, the state of their said accounts, and the business, earnings, profits, and dividends therefrom, and all and every the matters aforesaid, from the first organization of the company, to be laid before the said stockholders to be examined, together with the said books, to be compared therewith, and investigated as the said stockholders might think proper. And in pursuance of such call, the said meeting of stockholders was convened, at the time and place aforesaid, and in pursuance of the assurance so given to the company, the said other stockholders, by said E. A. Stevens, and not for the purpose or with any intent to elude or evade any action or order of this court, or on account or in any manner by reason of any application to this court, but in good faith for the full satisfaction of all the stockholders, in accordance with such assurance, all the books of the said company and the said abstracts thereof, were laid before the said stockholders by the treasurer and board of directors, and a committee was thereupon appointed to examine the same, and report thereon, by whom, during an interval of adjournment allowed for that purpose, such investigation and examination was made, and reported, and as these defendants believe, to the entire satisfaction of all the said stockholders except the complainant.

The defendants say there is no provision in the charter of the

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company requiring that the office of the directors be kept in New Jersey, but, nevertheless, they say that an office has always been kept in New Brunswick, by the treasurer of the company, in which the books of accounts of the treasurer are and always have been kept.

The defendants say that on or about March 18th, 1847, they were informed, and they believe it to be true, that the complainant was, in connection with sundry associates, about to commence the running of a steamboat from New Brunswick to New York, in opposition to the boat of the company, and they say he has admitted that such is his intention; and they believe that the whole object of the complainant, since he conceived such intention, and the object of filing his said bill, is to create difficulty in the company, expose its affairs and the private interests of the stockholders therein to the public, and, so far as in his power, to injure and break down the business of the company. And they say that since they received such information, E. A. Stevens has, as they admit, as one of the stockholders, having a very large interest in the company, and not otherwise, remonstrated and objected to subjecting the affairs of the company to such exposure, for the reasons above set forth, and for no other reason whatever, and with no purpose, object, or design than to promote the best interests of all the stockholders.

The defendants say that the said board of directors, and not E. A. Stevens, in the exercise of their best discretion, and, as they then believed and now believe, for the best interest of the stockholders, sold sixteen coal barges, the property of the company; that they did not call a meeting of the stockholders to consult them in regard to such sale, that it has not been usual to call such meetings or consult the stockholders in regard to the details of the business of the company, from the first organization to the present time; these defendants believing that the purpose for which the directors of the company were appointed was the conduct and management of such details, in their discretion, as the interest of the stockholders might require; and they deny that Stevens, or any of the defendants, or the said board of directors, have any intention of selling the said sixteen freight barges in the bill mentioned, unless the company should

go into liquidation and cause its affairs to be wound up and settled.

The defendants, denying as before that Stevens has independently, and not in subordination to the board and with their authority, concurrence or approbation, done anything in the premises, say that the business of the said company has, by and with such consent, authority and approbation, been done, and the accounts thereof kept in and under various names used to discriminate the different branches of their business, and for greater convenience in keeping the accounts thereof and distinguishing the different interests of the various persons who have from time to time been interested with them in the business done by them or in the different branches thereof. And in so doing, although these defendants do not now recollect the use of all the names in that behalf alleged in the bill, they are willing, for the purposes of this suit, to admit and do admit that all of the said names may have been used for the purposes aforesaid, during the period of the existence of the company; but they utterly deny that such names have been used for the purpose of concealing or keeping secret the operations or business of said company from the public or the stockholders, or to prevent them from obtaining any information in regard to the proceedings of the company, or for any unlawful or improper purpose, or from any other design or motive than to promote the convenient, safe and successful prosecution of the said business, and make the same profitable to the stockholders for their benefit and advantage.

They admit and say that from the time when E. A. Stevens consented, on the application of the said associates who afterwards became stockholders in the year 1831, to unite his interest in the transportation business with them, and became a stockholder as before stated, he has given thereto his best endeavors and exertions, in good faith, to promote the success of the company, enlarge its business and increase its profits for the benefit of the stockholders therein; and that in so doing he has at all times preserved a vigilant general superintendence of the affairs of the company and its various agents, and under the authority of the board of directors, and with their concurrence and appro-

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bation and in subordination to the president and directors, has managed the affairs and business of the company with fidelity and skill and greatly to the advantage of the said stockholders, and in such wise that the board of directors have been able to declare and pay to the stockholders annual dividends of from 16 to 18 per cent. per annum, from 1831 to this time, over and above the current expenses of the company and the aforesaid accumulation of capital, by earnings and profits of the business of the company, invested and reserved as aforesaid, amounting to more than four times the amount of the capital paid in by the stockholders; and that in his said general superintendence, the said Stevens has, with the concurrence and approbation of the said board of directors, and with the full knowledge and acquaintance of all the stockholders, from the year 1831 to the filing of the bill, exercised broad discretionary powers, and that no complaint has ever been made by any stockholder in relation thereto, or the management of the affairs of the company; and in such management the said Stevens has always done what, in good faith and in his best discretion, he deemed for the interest of the stockholders.

The defendants say that the conduct and management of the affairs of the company, so far as the same has devolved on said Stevens as above stated, has been, and as they believe, is now entirely satisfactory to every stockholder in the company, the complainant not excepted; and in confirmation of this they say that at the said meeting of the stockholders at New Brunswick, on the 3d of April, 1847, every share of stock was represented by the holder thereof in person or by proxy, except two shares in the name of A. Jenkins, deceased, in behalf of whose estate, however, his brother, M. Jenkins, was present and acted, (in what capacity the defendants are ignorant,) and except, also, one share in the name of William Gulick, who was absent. That at such meeting the said stockholders were informed that the complainant had given notice of an intention to apply to this court for the receivers prayed for in the bill, and thereupon the following resolution was unanimously passed by the stockholders, the complainant being present and voting for it, viz.:

“Resolved, That the thanks of the stockholders are due to

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Edwin A. Stevens for the ability and success with which the affairs of the New Brunswick Steamboat and Canal Transportation Company have been managed by him, and that they have undiminished confidence in the management of the affairs of the company."

The defendants, protesting and insisting that they are not liable, and cannot be required to render the accounts prayed for in the bill, in any suit to which the said New Brunswick Co. is not a party, say that they have rendered to the board of directors of the said company, full and true accounts of all and every their respective acts, receipts, and payments, in the conduct of the affairs of the company, and they say and insist that there is no proper party before the court to or with whom these defendants can, either in law or equity, be called to account.

They deny the breaches of trust and violations of duty charged in the bill, and all and every misapplication of the funds or property of the company, by them, or with their knowledge, and say that, so far as they have done, authorized, approved, or known, the whole conduct of the affairs of the company, and the application and appropriation of the funds of the company, have been done and made in good faith, for the best interests of the stockholders, and for the purposes, and within the powers embraced in the charter. The said investment of the funds of the company, in the purchase of boats, vessels, steamboats, and other property; the said reservation of a portion of its funds, by way of surplus, to meet and guard against contingencies, and provide for the purchase and building of boats; the employment of the boats and vessels of the company in manner above set forth; the running of the various transportation lines by the said company, as in the bill is stated and herein admitted; the termination of the said contract with the said Camden and Amboy Railroad Company; the aforesaid general superintendence of the business of the company by said E. A. Stevens, and the mode and manner in which such business has been done—have been open and notorious, and without any concealment on the part of these defendants, or any of them, and acquiesced in by the stockholders during the whole period of the existence of said company, until at or about the time of the filing of the bill.

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W. Halsted and *P. D. Vroom*, in support of the motion for a receiver.

They cited 1 *Edw.* 84, 518; 9 *Simon's Rep.* 53; 3 *Paige* 222; 6 *Cond. Rep.* 240; 6 *Wheat.* 597; 19 *John. Rep.* 1; 4 *Peters* 152; *Angell & Ames on Corp.* 60; 4 *Cranch* 128; 4 *Wheat.* 636; 3 *Ward* 583; 7 *Ib.* 31; 3 *Pick. Rep.* 232, 9; 2 *John. Rep.* 109; 4 *Pet.* 168; 11 *Ib.* 546; 6 *Hill's Rep.* 37; 4 *Wend.* 22; 4 *Day* 322, 3; 2 *Halst. Rep.* 98; 1 *Garrison* 94; *Cro. Jac.* 363, 503; 5 *Bac. Ab.* 344; 2 *Saund.* 277; 1 *Ld. Raymond* 202; *Cro. Jac.* 315, 425; 3 *Munroe* 17; 5 *Dana* 85; 1 *Smith's Prac.* 277; 8 *Ves.* 87; 9 *Missouri Rep.* 606; *Edw. on Receivers* 1, 2; 3 *Atk.* 564; 7 *Paige* 294; 1 *Ib.* 587.

- *L. B. Woodruff* and *G. Wood, contra.* They cited 1 *McCoy* 29; 2 *Paige* 438; 3 *Mylne & Craig* 309; 2 *John. Ch. Rep.* 371; 1 *Green's Ch. Rep.* 163; 15 *Pick. Rep.* 363; 2 *Russell* 126; 3 *Paige* 230; *Angell & Ames on Corp.* 441; 2 *Story's Eq. Jur.*, § 951; 4 *R'ph's Rep.* 578; *Angell & Ames on Corp.* 83, 4, 158, 9; 12 *Ves.* 4; 2 *Mad. Prac.* 187, 8, 9; 16 *Ves.* 59; 2 *Paige* 452; *Story's Eq.*, § 821; *Story on Partnership*, § 228; 1 *Russell* 441; 15 *Conn. Rep.* 475; 3 *Cowen* 264; 16 *Mass. Rep.* 102.

THE CHANCELLOR. The bill is exhibited by one stockholder of one incorporated company (The New Brunswick, &c.) against three other stockholders, who are also directors of the same company, praying an account of all the property bought by them, or either of them, with the money of the company, and of the rents and profits thereof, and of all moneys received by the defendants, or either of them, from the business of the company, and expended in the purchase of property, and that the defendants may account for all breaches of trust as directors, agents, or trustees of the company, and make good all losses incurred thereby, and may account for all moneys made by them, or either of them, by the purchase or sale of any property of the company; and may be decreed to pay to the complainant his proportionate share of what may be found due, and of all surplus moneys in the hands of them, or either of them, not required for the busi-

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ness of the company, or to pay the same to a receiver; and that all the property not necessary for the objects of the company may be sold, and the proceeds divided among the stockholders, or paid to a receiver; and that a receiver may be appointed of the rents and profits of the real estate at Camden, purchased with the funds of the company, and of all other property purchased by the defendants, or either of them, with the funds of the company, without the consent of the company, and not necessary for the objects thereof; and praying, also, an injunction restraining the defendants from selling any real estate purchased with the funds of the company, and from selling any other property of the company without the consent of the stockholders, and from managing and controlling the affairs of the company at their will and pleasure, and without the consent of a lawfully constituted board of directors. An injunction, pursuant to the prayer of the bill, was allowed.

A supplemental bill was afterwards filed, stating other facts, and making other persons defendants, and praying the same relief against them, and praying that they and the defendants in the original bill may be restrained by injunction from disposing of any property of the company, and from winding up its affairs, or causing it to go into liquidation, without the consent of the stockholders. An injunction, pursuant to the prayer of this bill, was also allowed.

A motion is now made, on the part of the complainant, for the appointment of a receiver, to take charge of certain real estate situated in Pennsylvania, on the Delaware river—one tract in Bristol and the other in Philadelphia (called the Walnut street property)—alleged by the bill to have been purchased with the funds of the said "The New Brunswick," &c., the legal title to which tracts, respectively, is in the name of one or more individuals, without the recognition of any interest of "The New Brunswick," &c., therein; and also to take charge of certain moneys, alleged in the original bill to be the funds of "The New Brunswick," &c., in the hands of E. A. Stevens, the use of which, the bill alleges, he has improperly obtained.

The answer of the defendants to the original and supplemental bill has been read in opposition to the motion; and, among

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other things, states that the said moneys were loaned to said Stevens by the board of directors of "The New Brunswick Steamboat and Canal Transportation Company."

There is one ground on which, in view of the whole case as developed by the bill and answer, the motion for a receiver might, perhaps, be safely denied, without considering other objections to the allowance of it. From the allegations of the bill, it would seem to appear that the enormous accumulation of property by the New Brunswick Co., of which the property for which a receiver is asked is claimed to be a part, is the result of a fraud on the rights of others, not parties to this suit, nor parties to the arrangement between the New Brunswick Steamboat and Canal Transportation Co. and the united railroad and canal companies, set forth in the bill, which produced such accumulation. And this may turn out to be so, notwithstanding anything said in the answer. If this be true, this court would not become the instrument to distribute the spoils, on the application of one who has been a stockholder from the beginning in the New Brunswick Steamboat and Canal Transportation Co., and cognizant of the fraudulent arrangement and proceedings which produced such accumulation, which is the position of the complainant in this case.

But the motion must be denied on other grounds. As to the Walnut street property, it was in the use of the New Brunswick Co. a number of years, and during that time the situation of it in reference to title was the same as it is now. While the arrangement with the said united companies existed, and the business charged by the complainant to be illegal and fraudulent, and from which the overgrown accumulation of property arose, was continued, the complainant, with full knowledge of the arrangement, was silent. But when the business was discontinued, the complainant filed his bill, alleging that this property is not necessary for the legitimate business of the New Brunswick Steamboat and Canal Transportation Co., and prays that it may be sold, and the proceeds of it distributed; and asks that a receiver may at once, on the filing of his bill, be appointed to take charge of it. The complainant is in no more danger now in reference to the title of this property than he has been for years,

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and no apprehension of danger is alleged as to the responsibility of the person in whom the title is. Delay is often fatal to an application for a receiver, and in this case an application by this complainant for the prompt action he asks of the court comes with ill grace. As to the real estate in Bristol, the title is in a director of the New Brunswick Co., whose responsibility is not questioned, and no danger of loss is suggested.

As to the money loaned to Stevens—when the object of a suit is to compel the payment of a sum of money, there seems to be no propriety in ordering it to be paid to a receiver on the filing of the bill. It may also be said, in reference to this money, that no danger or apprehension of loss is suggested.

It is unnecessary to consider the difficulty suggested on the argument of appointing a receiver to take charge of real estate situated in another state.

Motion denied.

WILLIAM PHOENIX v. SILAS C. CLARK.

1. On bill by a mortgagee against a mortgagor, making other mortgagees, and judgment creditors of the mortgagor parties defendant, a decree for sale was made, to satisfy the encumbrances, according to their priorities. The property was sold under the decree. Afterwards, the mortgagee last in priority, the proceeds of the sale under the decree not being sufficient to pay any part of his mortgage, bought the property from the purchaser under the decree, and filed a bill against the mortgagor, who still remained in possession, to restrain him from committing waste. The injunction was allowed, and a motion to dissolve it was denied.

2. After sale of mortgaged premises under decree and execution, the mortgagor in possession will be restrained from committing waste.

Silas C. Clark and his wife gave several mortgages on lands in Morris county, the first of which was held by Edward W. Whelpley, the second by Barnabas Doremus, the third by Joseph Cutler, the fourth and fifth by Charles J. Skellinger and William Phoenix, respectively. Joseph Fairchild, Charles J.

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Skelleuger, John Condit, and John H. and Thomas Stephens recovered judgments against Clark, in the Circuit Court of Morris.

Doremus filed his bill in this court for foreclosure and a sale of the mortgaged premises, and made the other mortgagees and the judgment creditors defendants. A decree was made for the sale of the premises to satisfy the encumbrances, according to their priorities.

The sheriff sold the premises to one Freeman Wood, Phoenix not being present at the sale, and conveyed the premises to Wood on the 1st of October, 1846. The sum for which the premises sold was insufficient to pay any part of Phoenix's mortgage, after satisfying the prior mortgages.

On the 26th of October, 1846, Phoenix agreed with Wood to give him what he had paid to the sheriff and \$50 for the premises, and Wood agreed to take it, and thereupon conveyed the premises to Phoenix.

On the 4th of November, 1846, Phoenix filed his bill stating the before-mentioned facts, and that he bought the premises from Wood, as aforesaid, in order to secure to himself the amount decreed to be paid to him on his mortgage; that the lands are a scanty security for the money so paid; that they are still occupied by Clark; that he, Clark, is embarrassed in his pecuniary affairs, and unable to pay to him, Phoenix, the amount so adjudged and decreed to him; that since the said decree, and since the said sale to Wood, and since the said conveyance by Wood to him, Phoenix, Clark has committed great waste upon the premises by cutting down the wood and timber; and that, on the Friday or Saturday of the week before the bill was filed by Phoenix, Clark cut down a large quantity of wood and timber, and sold it to one Stephen Connett; and praying an injunction against Clark, restraining him from committing further waste.

The injunction was granted.

A motion was made, without answer, to dissolve the injunction.

A demurrer was also filed to the bill.

V. Dalrimple, in support of the demurrer and of the motion to dissolve the injunction.

J. S. Hager, contra.

THE CHANCELLOR. The motion to dissolve is denied, and the demurrer to the bill overruled. It is true that the purchaser at the sheriff's sale, or his grantee, might bring ejectment, and obtain from the court in which the ejectment is brought, a rule to stay waste, but in the meantime, and before that could be done, the mortgagor, remaining in possession, might destroy the property, or commit irreparable waste, and compensation in damages might not be attainable by reason of the inability of the mortgagor to respond.

If this court should not, itself, put the purchaser at sheriff's sale, of mortgaged premises, in possession, it should certainly extend its arm to protect the property from waste and destruction until the purchaser can have an opportunity of obtaining the aid which a court of law, on ejectment being brought, can afford him to prevent waste. In this case the title has passed from the defendant by the decree of this court. There is, therefore, no question of title in the way. The mortgagor is merely holding possession of the property, without pretence of title, till he can be lawfully dispossessed.

I have no doubt of the propriety of the interference of this court in such a case by injunction.

Motion denied, and demurrer overruled.

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ABRAHAM P. YOUNG v. THE EXECUTORS OF JACOB YOUNG.

Award set aside, on the ground that the arbitrators acted on a matter not within the submission.

Jacob Young died June 2d, 1843, leaving a will, dated July 1st, 1840, of which he appointed Samuel Stewart, Philip Fine, Edward Hunt, and his son, Abraham P. Young, the complainant, executors. Fine died in May, 1845. Differences having arisen between the complainant and the other surviving executors, they agreed to submit the same to arbitration, and, thereupon, the complainant, in his individual capacity and also as executor, and the said Stewart and Hunt, the other surviving executors, on the 13th June, 1845, entered into an agreement under seal, by which they submitted all matters in difference as set forth in the schedule annexed to the said agreement, to three persons therein named, arbitrators by them chosen, and mutually covenanted and agreed, under the penalty of \$500, to abide and perform the award of the said arbitrators unanimously rendered.

The schedule annexed to the agreement contained, on the one side, an account of the complainant against the estate of the testator, commencing March 13th, 1814, and running to and including the year 1833, and consisting of charges for rails and fencing stuff, lumber, shingles, glass, carpenter and mason work, work done at house, work at barn, hauling stone and timber, cutting timber, boarding hands, money paid carpenter and mason, lumber for grain-house, carpenter and mason work, shingles and nails; and, on the other side, a statement of the claim of the executors against the said Abraham P. Young, as follows:

"Balance on bond dated January 23d, 1819, penal sum \$950, conditioned for payment of \$475 on or before May 1st, 1819, with interest from day of payment, drawn by Abraham P. Young and Jacob Young to Philip Slout, paid off by Jacob Young."

The testator had three sons, the complainant and two others, and had, in his lifetime, put each of them in possession of a

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farm ; and had put buildings on the farms, respectively, of which he had put the other two sons, severally, in possession, at his own expense. A large part of Abraham's account annexed, as aforesaid, to the agreement of submission was for materials furnished and work and labor done in putting up buildings on the farm of which he had been put in possession. The several farms were devised to the sons severally in possession.

It was admitted before the arbitrators that an agreement had been made between the father and the sons, by which the several farms were allotted to the sons severally, and to be devised to them respectively, on their paying a certain sum per acre. And it was also admitted before the arbitrators, that Abraham was charged in the will \$4 an acre more for the farm devised to him than by the said agreement he was to be charged.

The arbitrators admitted evidence that Abraham had cut and sold timber from the farm in his possession, (afterwards devised to him,) in the lifetime of the testator, and twenty years prior to the agreement of submission, and, considering this wood and timber as a set-off against his whole account, allowed him nothing on his account, and made an award against him for the amount of the principal and interest of the bond stated in the schedule annexed to the agreement of submission.

The bill was filed to set aside the award.

An answer was put in by the executors, and testimony was taken.

P. B. Kennedy and *P. D. Vroom*, for the complainant. They cited 10 *Wend.* 498 ; 1 *John. Ch.* 313 ; 2 *Paige* 193 ; 15 *John. Rep.* 511, 229 ; 1 *Green's Rep.* 68 ; 2 *South. Rep.* 721 ; 3 *John. Rep.* 427 ; 9 *Ib.* 141 ; 1 *Green's Ch. Rep.* 297, 301 ; 3 *Atk.* 468 ; 3 *Wash. C. C. Rep.* 45 ; *Coxe's N. J. Rep.* 385 ; 2 *Penn. Rep.* 932 ; 5 *Halst. Rep.* 17 ; 2 *Green's Rep.* 333.

H. McMiller and *S. G. Potts, contra.* They cited 10 *John. Rep.* 143 ; 3 *Ib.* 367 ; 2 *Ib.* 62 ; 1 *McCord* 408 ; 2 *Bibb* 456 ; 3 *Ib.* 441 ; 1 *Ward.* 236 ; 2 *Cowen* 638 ; 1 *Ib.* 117 ; 5 *Wheat.* 394 ; 10 *Wend.* 589 ; 14 *John. Rep.* 96 ; 3 *Bl. Com.* 16 ;

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16 *Vi. Rep.* 450; 7 *Cowen* 186; 3 *Caines* 166; 1 *Lord Raym.* 248.

THE CHANCELLOR. The submission was of Abraham's account against the estate, on the one side, and of the claim of the executors on the bond on the other. Both were very stale demands. The bond was due in May, 1819. When the testator paid it, if he did pay it, did not appear. There was a credit on it, March 17th, 1823, of \$22.08, signed by the testator.

On this submission, both parties were at liberty to rely on the lapse of time as a bar, or neither was. The arbitrators could not capriciously give effect to the lapse of time as against one, and refuse to do so as against the other. That was not the course adopted by the arbitrators. It is clear that they reached their result by permitting the executors to show that Abraham had cut from the farm in his possession, wood and timber, twenty years before, and by offsetting this wood and timber against his account, and charging him with the principal and interest of the bond, notwithstanding the lapse of time and his insistment before them that he had paid the bond.

Would Abraham have entered into a submission which would allow the executors to claim against his account the value of the wood and timber he had cut from the farm in his possession, and which had since been devised to him? He did not make such a submission. The particular subjects of submission were designated. And the case shows sufficient reason why Abraham should not agree to submit the matter of the wood and timber. The father paid for the buildings put on the farms of the other two sons. Should the wood and timber which Abraham took off the farm devised to him be considered as a payment by the father for the buildings put on this farm?

Again, it was admitted before the arbitrators that Abraham was charged in the will \$4 an acre more for the farm devised to him than he was to have been charged under the agreement, also admitted to have been made, by which the several farms were allotted to the several sons, and were to be devised to them on paying a certain sum per acre. These are abundant reasons why Abraham should not make such a submission as would au-

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thorize the arbitrators to charge him with the wood and timber he had taken off the farm allotted and devised to him. The arbitrators did charge him with this wood and timber; and in doing so they acted upon a matter not within the submission.

For this reason, the award will be set aside.

Order accordingly.

THOMAS J. OAKLEY v. DARIUS YOUNG AND OTHERS.

1. In August, 1844, B. recovered a judgment against Y., who was then seized of certain lands. On the 6th of January, 1845, Y. conveyed an undivided half of said lands to L. On the 14th of January, 1845, Y. confessed a judgment to L., upon which execution was immediately issued and levied upon all the right of Y. in the said lands. On the 9th of August, 1845, execution was issued on B.'s judgment, and levied on all the said lands. An injunction was allowed, restraining the sheriff from selling, under the judgment confessed to L., the undivided half which had been conveyed to him prior to the entry of his judgment.

2. The bill further charged that the judgment confessed to L. was collusively confessed and taken for the purpose of defeating the prior judgment, and of protecting Y.'s property from his creditors; and prayed that B.'s judgment might be declared the prior lien on all the lands. A demurrer to the bill was overruled.

The bill states that in August, 1844, John F. Bailey obtained a judgment against Darius Young, by confession, for \$10,000; that Young was then possessed of block 11, in Jersey City, which was conveyed to him by the Associates of the Jersey Co., May 20th, 1844.

That on the 6th of January, 1845, Young and his wife conveyed an undivided half of this block to Lathrop and Bartlett, for the consideration expressed of \$6009; and on the same day released to Lathrop and Bartlett the undivided half of the water right in front of the block.

That Bailey assigned his judgment to the complainant on the 24th of February, 1845, for the consideration expressed of

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\$5000; and covenanted that there was \$5000 due, and interest and costs.

That before taking the assignment, the complainant inquired of Young as to the said judgment, and was told it was valid, and that the amount thereof was due Bailey; and the complainant then told Young he was about to take an assignment of the judgment, to which Young made no objection, but solicited the complainant to delay issuing execution on the said judgment, which he did.

That on the 14th of January, 1845, Young confessed a judgment to Lathrop and Bartlett for \$6101.81, and on the 17th of June, 1845, another judgment for \$8220.62.

That when these judgments were confessed to Lathrop and Bartlett, they knew of the Bailey judgment, and connived and colluded with Young to have the said judgments confessed to them, in order to defeat the Bailey judgment, and to defraud the complainant of the benefit thereof. That the complainant, confiding in Young, deferred issuing execution for nearly a year from the date of the Bailey judgment.

That on the 14th day of January, 1846, Lathrop and Bartlett issued and delivered to the sheriff an execution on the first of said judgments confessed to them; and on the 17th of June, 1845, delivered to the sheriff an execution on the other of said judgments. That on the 9th of August, 1845, the complainant delivered to the sheriff an execution on the Bailey judgment, which was levied on the whole of said block and water right.

That the sheriff, on the said executions in favor of Lathrop and Bartlett, levied on all the right, title and estate of Young in the said block and water right.

That Lathrop and Bartlett caused the sheriff to make his levy in manner aforesaid, and thus to include as well the undivided half conveyed by Young and wife to them, by the deed of January 6th, 1845, as the other undivided half belonging to Young, for the purpose of defeating the lien of the complainant's judgment on that half of the block and water right conveyed by Young and wife to them as aforesaid.

That Lathrop and Bartlett, before the confession of the said judgments to them, became embarrassed and had not the means

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to advance the amount of the said judgments. That the amount of the said judgments is not due, and that they were taken for a larger sum than was due, for the purpose of covering the property of Young, and delaying and hindering other creditors; and that the said judgments, or a great portion thereof, have been paid by Young since they were confessed, and that they are kept on foot for the purpose of protecting the property of Young from the other creditors.

That Lathrop and Bartlett now claim the right to sell under their said two executions, not only the moiety of the said Young in the said block and water right, but also the moiety of the block and of the water right conveyed to them, as aforesaid, by Young and wife, and that, by so doing, they will relieve that half from the lien of the complainant's judgment.

That Lathrop and Bartlett caused notice to be served that an application would be made to the Supreme Court, on the 7th of January, 1846, for a rule on Bailey to show cause why satisfaction of his judgment should not be entered, alleging that it had been fully paid, and for an order to stay all proceedings on the said judgment.

That Young has, since the entry of the Bailey judgment, become insolvent.

That the complainant believes that the object of the said application to the Supreme Court is to delay and defeat a sale of the said property of Young, and of Lathrop and Bartlett, under the Bailey judgment, and to enable Lathrop and Bartlett first to sell said property on their said judgments, and to give an unjust advantage to their said judgments.

That the whole amount of the said two judgments confessed to Lathrop and Bartlett was not due them, but, if really found due, that so much as shall be found due, and for which the said judgments were confessed, should, *pro tanto*, be considered as having been previously paid to Lathrop and Bartlett, on their said executions, by the transfer of the half of the said block and water right, at the consideration expressed in the deeds, and that Young, and Lathrop and Bartlett are bound by and estopped from denying the same, they having had full notice of the complainant's judgment, and of its priority.

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That the sheriff has declared he will sell all the said block and the water rights in front thereof, first, on the said judgments of Lathrop and Bartlett, before selling on complainant's said judgment.

The bill prays that the said judgments confessed to Lathrop and Bartlett may be declared fraudulent and void, as against the complainant, or, if they be deemed valid, that an account may be taken of what is justly due thereon; and that the judgment of the complainant may be declared a lien on all the property Young was seized of at the entry of this judgment, and, particularly, on the half of said block and water right sold by Young and wife to Lathrop and Bartlett since the entry of the Bailey judgment; and that the priority of the Bailey judgment, as a lien on all the real estate Young was seized of at the time of its rendition, may be established over the lien of the said judgments of Lathrop and Bartlett. And that the defendants may discover whether Lathrop and Bartlett, before the rendition of their said judgments, became embarrassed, and whether they advanced the amount of the respective bonds on which the said judgments were confessed, and may set forth the claims, and of what they consisted; of the account of Lathrop and Bartlett, which made up the sums mentioned in the conditions of the said bonds, and the credits to which Young is entitled on said account, and, specifically, of what they consisted, and all payments made by him to them, on account of his indebtedness to them, on account of said judgments; and that the amounts justly due from Young to them, if any, may be ascertained under the direction of this court; and that the sheriff may be restrained from selling any of the said real estate of Young, under the said executions of Lathrop and Bartlett, or that a sale of all the lands of Young may be made under the direction of this court, and the moneys arising therefrom be brought into this court, for distribution to and among such of the creditors as shall be entitled to the same, according to their legal priorities.

An injunction was allowed, according to the prayer of the bill in that respect.

The defendants filed a general demurrer to the bill.

The papers were submitted to the court without argument.

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E. R. V. Wright and *Thos. W. James* in support of the demurrer.

W. Halsted, contra.

THE CHANCELLOR. The demurrer will be overruled.
Order accordingly.

ANDREW S. GARR v. SELAH HILL.

The repetition in a further answer, or in an answer to an amended bill, of anything contained in a former answer, which is not necessary or expedient, is impertinent.

The answer was excepted to, and some of the exceptions were allowed by the master. The complainant then amended his bill. The defendant, in answering the exceptions and the amended bill, repeated the whole of his first answer, which contained eighty folios. The second answer was excepted to for impertinence. The master reported that the exception was not well taken. An appeal to the Chancellor was taken to this report.

S. R. Hamilton, for the appeal, cited 1 *Hoff. Ch. Pr.* 252; 3 *Atk.* 303; 1 *Cooper's Eq. Pl.* 322; *Mitford Pl.* 257, 318; 1 *Barb. Ch. Pr.* 196; 2 *Ib.* 424; 6 *Paige* 46; *Story's Eq. Pl.*, § 868; 8 *Paige* 590.

P. D. Vroom, contra.

THE CHANCELLOR. The exception should have been allowed. The repetition in a further answer, or in any answer to an amended bill, of anything contained in a former answer, which is not necessary or expedient, is impertinent.

Clark v. Wood.

SILAS C. CLARK v. FREEMAN WOOD AND WILLIAM PHOENIX

1. Notice of trial is a breach of an injunction staying proceedings in an action at law.

2. On bill by one in possession of land, for the specific performance of an alleged agreement, by the defendant, to purchase the land at sheriff's sale, on execution against the complainant, and take a mortgage for the amount advanced by him to pay encumbrances, an injunction to restrain proceedings to recover possession from the complainant will not be retained until the hearing, if the amount due is large in proportion to the value of the land, and the responsibility of the complainant is comparatively limited

The bill was filed by Silas C. Clark, who had given several mortgages on his lands, and against whom several judgments had been recovered. It alleges that an agreement was made between him and the defendant Freeman Wood, prior to the sheriff's sale under the executions then levied on the complainant's lands, that Wood should pay the encumbrances on the land, except the mortgage to Phoenix, the other defendant, which the complainant says he intended to make other arrangements to pay off, and that Wood should become the purchaser at the sheriff's sale, and that the complainant should have the right to redeem the lands by paying to Wood what he should advance in paying encumbrances, and that Wood should give the complainant a writing to that effect, or that he would release the lands to the complainant, and take a mortgage thereon from the complainant for the money he should advance, as soon as the sheriff's deed should be made to him, Wood, at the option of the complainant, and that the complainant should remain in the possession of the lands.

The bill further states that after the property was struck off and conveyed by the sheriff to Wood, he made a deed for the land to Phoenix, who is charged with notice of the agreement, in consideration of the amount which he, Wood, had advanced, and \$50; and that Phoenix had commenced an action of ejectment at law to recover possession of the land.

The bill prays performance of the said agreement, and an injunction restraining further proceedings in the ejectment.

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The injunction prayed was allowed.

Answers were put in, and a motion made to dissolve the injunction.

J. D. Hager and *E. W. Whelpley*, for the motion.

V. Dalrimple, contra.

Mr. Dalrimple stated, and it was not denied, that since the service of the injunction the plaintiff in the ejectment had caused a notice of trial in that action to be served, and submitted that the motion should not now be heard.

The Chancellor said it was a breach of the injunction to give notice of trial. See 2 *Sim. and Stu.* 186.

The notice of trial was thereupon countermanded, and *Mr. Dalrimple* consented that the argument of the motion to dissolve should proceed.

Cases cited in support of the motion: 4 *Wheat.* 255; 1 *Mason* 191; 3 *Wend.* 208; 2 *Story's Eq.*, § 1020; *Rev. Stat.* 658, § 4; *Saxton* 537; 1 *Green's Ch.* 264; 2 *Ib.* 429; 1 *Halst. Ch.* 20; 2 *Sugdon on Vendors* 221, 223, note; 2 *Pick.* 184.

Contra, 3 *Green's Ch.* 310, was cited.

THE CHANCELLOR. This is not a bill to redeem on paying the amount due *Phoenix*. The object of the bill seems to be to compel *Phoenix* to take a mortgage for what he paid to *Wood* and the amount of his own mortgage.

The question now presented is, whether the complainant shall be permitted to keep possession pending the controversy in this court, or whether *Phoenix* shall not be permitted to recover, and hold possession during the controversy.

The amount due *Phoenix* is large, in proportion to the value of the land, and the responsibility of the complainant appears to

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be comparatively limited. Under these circumstances, I think the injunction should be dissolved.

Order accordingly.

JOHN J. HERRICK AND ABRAHAM VAN BOSKIRCK v. ABIJAH MANN, JR., AND OTHERS.

1. A gave a mortgage to B, and died, leaving a will, of which he appointed four executors. C, claiming the mortgage through an assignment by the executors to one of themselves, and an assignment by him, for his own purposes, to an assignee, in trust for a company, and an assignment by said trustee to C, filed a bill of foreclosure on the mortgage, and obtained a decree for sale. The property was sold by the sheriff, and bought by D, who paid the purchase money to the sheriff, and received a deed. Before the sheriff paid over the money, D filed a bill, stating that the alleged assignment by the executors of A, to one of themselves, was void; that one of the said executors alleges that his name appearing to the said assignment is forged, and that the said mortgage is a part of the assets of the estate of A; that the executors of A were not made parties to the foreclosure bill; that one of the said executors had given notice to the clerk of Hudson not to permit the cancellation of the said mortgage; and praying that the parties claiming the said mortgage and the proceeds thereof may interplead; and that the sheriff may be enjoined from paying the money to either of them, and may be ordered to pay it into court, to abide, &c.

2. The orders prayed were allowed; and a motion, without answer, to vacate them, was denied.

In February, 1836, John Bruce and Charles Bruce, of New York, gave their bond to James Ballagh, of New York, conditioned for the payment of \$2000, in one year, with interest, and to secure the same, the said Bruces, with their wives, gave a mortgage to Ballagh, of the same date, on lot No. 8, Essex street, and lot No. 7, Morris street, in Jersey City, being the same premises which Ballagh had conveyed to them. Ballagh died in January, 1838, leaving a will, of which he appointed Hannahrietta C. Ballagh, executrix, and George D. Strong, William Ballagh, John S. McKibbin, and Oliver Woodruff, executors, all of whom proved the will.

On this mortgage a bill of foreclosure was filed in 18 , by

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Abijah Mann, Jr., against the mortgagors and others, the executors of Ballagh not being made parties, stating that the executrix and executors of Ballagh, on the 6th September, 1838, in consideration of \$2000 to them paid by the said George D. Strong, assigned the said bond and mortgage to the said George D. Strong, and that, on the same day, the said George D. Strong, in consideration of \$2000 to him paid by Joseph D. Beers, president of the North American Trust and Banking Company, in trust for the said company, assigned the said bond and mortgage to the said Beers, to hold to him, his successors and assigns; that on the 1st of October, 1840, the said Beers, in consideration of \$2000 to him paid by Thomas G. Talmage, president of the said Trust Company, assigned the said bond and mortgage to the said Talmage, to hold to him, his successors and assigns; and that said Talmage, on the 15th December, 1840, in consideration of \$2000 to him paid by Henry Yates, Thomas G. Talmage and William C. Noyes, trustees, assigned the said bond and mortgage to them, to hold to them and the survivor of them; and that, on the 1st of June, 1844, the said Yates, Talmage and Noyes, in consideration of \$2000 to them paid by the said Abijah Mann, Jr., assigned the said bond and mortgage to him, the said Abijah, his heirs and assigns, for his and their benefit forever.

On this bill a decree was made for the sale of the property to satisfy the mortgage, and lot No. 8 sold by the sheriff, on an execution issued on the decree, and John J. Herrick and Abraham Van Boskirek became the purchasers thereof, at \$3300, and paid the purchase money to the sheriff and received from him a deed for the property.

Herrick and Van Boskirek then filed their bill, stating that they have been informed that the said sheriff has not paid over to the said Abijah Mann, Jr., or to his solicitor, all the moneys paid by them to him on account of the purchase of the said lot, but retains in his hands a large portion thereof; that since the said sheriff delivered to them the deed for the said lot, they have been informed that the said Abijah Mann, Jr., has now no authority to receive the money due on the said decree for the sale of the said mortgaged premises, for which he filed his

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said bill; that at the time the said Mann filed his said bill, he acted as the special receiver under an assignment from Yates, Talmage and Noyes, trustees of the North American Trust Co.; and that these complainants have been informed that, at the time of the said sale made by the sheriff, the said Mann had no power or authority, under the said assignment, to receive the said money, but that the power of the said Mann under the said assignment, at the time of the said sale, had been annulled by some court in New York, the complainants understood the Vice Chancellor's Court.

That since receiving the said sheriff's deed, these complainants have been informed that the said executrix, and the said executors, Ballagh, McKibbins and Woodruff, or some of them, deny their right as such executrix and executors to assign the said bond and mortgage to the said Strong, a co-executor; and that the said assignment is void in law; and that the said executrix and executors are entitled to the said bond and mortgage as part of the assets of the estate of said James Ballagh, deceased.

And these complainants further state, that since receiving the said sheriff's deed, and on or about February 25th, 1847, the said Oliver Woodruff, executor as aforesaid, stated to the complainant Van Boskirck, that he, the said Woodruff, never executed, as one of the said executors, any such assignment as stated in the bill of the said Mann, to the said Strong, of the said bond and mortgage, and that his signature to the said assignment was a forgery; and the said Woodruff denied that the said Mann could derive any title to the said bond and mortgage by or through the said assignment; that these complainants have been informed that the said executrix and executors of James Ballagh, deceased, except Strong, have given notice to the clerk of Hudson not to cancel the said mortgage, and have threatened to dispute the title of these complainants under the said sheriff's deed, and have given notice to the said sheriff not to pay over to the said Mann, or his solicitor, the said consideration money of the said sale.

That these complainants have been informed that the said consideration money remains in the hands of the said sheriff, except a portion thereof, how much the complainants are not par-

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ticularly informed, which has been paid by the said sheriff to the solicitor of said Mann.

The complainants then state, in the bill, that they hoped that said Mann and the said executrix, and the said executors, Ballagh, McKibbin, and Woodruff, would have adjusted, between them, their differences respecting the question to whom the said money in the hands of the said sheriff belongs, and would not have disturbed the title of the complainants to the said premises under the said sheriff's deed, but that the said executrix and the said three executors above named, on the one hand, and the said Mann, on the other, claim the said money in the hands of the said sheriff and of the solicitor of the said Mann, and that the complainants, under the circumstances, are in danger of being harassed on account of the said money, and on account of the title to the said premises.

The bill prays that the defendants may answer, and that the said executrix and executors, including Strong, and the said Mann may set forth to whom the said money is due and payable, and may be decreed to interplead and adjust their several claims between themselves; that the said money may be paid into court, till the said claims are adjusted, and that the said sheriff and the said solicitor of Mann may be enjoined from paying to the said Mann, or to the said executrix and executors, the said money, till the further order of this court; that the said sale to the complainants may be confirmed, or, if it be more agreeable to equity, that the said sale may be set aside, and the said purchase money refunded to the complainants.

An injunction and an order directing the sheriff to pay the money into court, were allowed.

A motion was made, without answer to the bill, to dissolve the injunction and vacate the order.

D. A. Hayes, for the motion, cited 3 *Daniell's Ch. Pl. and Pr.* 1753, note 1; *Mitf. Pl.* 49, note 141.

I. W. Seudder and *J. D. Miller*, *contra*.

THE CHANCELLOR. Let the order and injunction stand until the answers of Strong and Mann come in.

Motion denied.

Roll v. Smalley.

SUSAN ROLL v. ABNER SMALLEY AND OTHERS.

On a bill by a second mortgagee, nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the first mortgagee comes in with his mortgage, and thereby consents that a decree shall be made for the sale of the property, to pay his mortgage, also.

Boltus Roll devised to his widow, Susan Roll, the use of all his homestead plantation, during her life. She conveyed to Abner Smalley all her estate in the plantation, and Smalley, in consideration thereof, executed to her his bond in \$500, and a mortgage on his estate, in the said plantation, conditioned for the comfortable support of the said widow during her life, or, in default thereof, for the payment to her of \$500, with interest thereon. The mortgage was recorded.

Smalley afterwards gave a mortgage on his estate in the said plantation to one Wilson, for \$750, which was afterwards assigned by Wilson to Stephen A. Burt. Burt filed a bill of foreclosure on his mortgage, making Susan Roll, the first mortgagee, a party defendant, and setting out the mortgage to her; and process of subpoena was served upon her. A decree *pro confesso* was taken against the defendants in that suit, and a reference to a master ordered. Susan Roll's mortgage was not put in before the master, and he reported the amount due on Burt's mortgage.

A sale was made by the sheriff, under the decree, and Brooks Sayre became the purchaser, at \$735.

Susan Roll afterwards filed her bill for the foreclosure of her mortgage, and Sayre put in an answer, setting up the said decree and the sale to him under it.

A replication was put in, and testimony was taken, showing that Sayre knew of the mortgage to Susan Roll, before the sheriff's sale.

F. B. Chetwood, for complainant.

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L. C. Grover, for defendant.

THE CHANCELLOR. On a bill by a second mortgagee, nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the first mortgagee comes in with his mortgage, and thereby consents that a decree shall be made for the sale of the property to pay his mortgage also. No other decree was made on the bill filed by Burt. The sale under that decree, therefore, was a sale subject to the mortgage of Susan Roll.

Decree for complainant.

THE EXECUTORS OF AARON D. WOODRUFF, SURVIVING EXECUTOR OF THOMAS LOWREY, v. JOHN BRUGH AND OTHERS.

1. After 23 years from the taking of a decree *pro confesso* on an original bill against all the defendants therein except one, and 22 years after that one had answered the original bill, no step having been taken in the meantime in the original suit, a supplemental bill was filed against some of the defendants to the original bill, and against other persons who had become assignees of others of said defendants since the decree *pro confesso* was taken.

2. A demurrer to the supplemental bill was allowed.

On the 2d of October, 1822, Elias D. Woodruff and Thomas L. Woodruff, executors of the will of Aaron D. Woodruff, deceased, who was surviving executor of the will of Thomas Lowrey, deceased, filed their bill, stating that on the 1st of April, 1810, Jacob Housel, being indebted unto Aaron D. Woodruff and William McGill, executors of the will of Thomas Lowrey, deceased, in \$10,865.78, executed to the said executors of Lowrey's will three bonds, dated April 2d, 1810; the first conditioned for the payment of \$3521.92½, on the 1st of April, 1811, with interest; the second, for the payment of \$3621.92½, on

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the 1st of April, 1812, with interest; the third, for the payment of \$3621.95½, on the 1st of April, 1813; and that to secure the payment of the said bonds, the said Housel, with Mary, his wife, on the day of April, 1810, executed a mortgage to the said executors of Lowrey's will on certain lands, (described in the bill.) That the mortgage was recorded on the 13th of April, 1810.

That on or about the day of , 18 , Esther Lowrey, widow of said Thomas Lowrey, died. That the said William McGill died intestate, June 24th, 1815.

That on or about June 25th, 1816, the said Aaron D. Woodruff died, leaving a will dated June 8th, 1814, of which he appointed the complainants executors.

That on the day of , 1820, the moneys mentioned in the said second and third bonds remaining unpaid, the complainants filed their bill in this court against the said Jacob Housel and Mary, his wife, to foreclose, &c., and for the sale of the said mortgaged premises; and that on the 12th of October, 1821, it was decreed that the mortgaged premises, or such part thereof as might be sufficient for the purpose, be sold to pay to the complainants \$7578.41, with interest thereon from the said 12th of October, 1821, and the further sum of \$53.37, costs; and that a *fi. fa.* was issued on the said decree, directed to Edward Welsted, sheriff of Hunterdon. That on the 23d of April, 1822, the said sheriff sold the said mortgaged premises, at public vendue, to one Samuel Britton, for \$8900. That afterwards, on the 6th of May, 1822, the said Jacob Housel, and John Whiting, Henry Rockafellow, John Brugh, Thomas Ellicott, Reuben Lee, Mary Gray, Henry Chamberlain, Samuel Rockafellow and Wilson Housel presented to this court their petition, setting forth, among other things, that the said Jacob Housel, after giving the said mortgage, and before the filing of the said bill, had sold and conveyed part of the said mortgaged premises, and that the same were then held as follows: A house, store-house and about ½ an acre by John Brugh; a house and about ¼ of an acre by Thomas Ellicott; a house and about ½ an acre by Reuben Lee; a house and about ¼ of an acre by Mary Gray; a house and about ¼ of an acre by

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Henry Chamberlain ; two lots of about half an acre by Samuel Rockafellow ; a lot of about a quarter of an acre by Wilson Housel ; and a lot of about three-quarters of an acre by George Dills ; and praying that the said decree might be opened, and the said petitioners made parties to the said suit, and let in to defend the same or to redeem the said mortgaged premises. That, on the said 6th of May, 1822, it was ordered by this court that the said petition and the affidavit thereto annexed be filed, and that the parties interested in the matters therein stated be heard before this court upon the matters and prayer of the said petition, on the 24th day of May then instant, and that Edward Welsted, Esq., sheriff of Hunterdon, do not execute any deed for the mortgaged premises so by him exposed for sale, until the parties should be heard upon the said petition, or this court should make further order respecting the same ; and that a copy of the said order and of the said petition be forthwith served on the solicitor of the complainants and also on the purchaser.

That, afterwards, on the 29th of May, 1822, an order was made by this court upon the said petition, as follows : (The order sets aside the said sale made by Sheriff Welsted, and directs the said sheriff to make sale of that part of the mortgaged premises not conveyed by the said Jacob Housel before the filing of the said bill, without prejudice to the right of the complainants to that part of the said property so conveyed in case the part so as aforesaid to be sold should prove insufficient to pay the debt, interest, and costs due the complainants ; and that the costs of this application be paid out of the proceeds of the sale.)

That, on the 5th of August, 1822, the said sheriff sold that part of the mortgaged premises not conveyed by said bill, to Samuel Britton, for \$7100.

That the proceeds of the said last sale, after deducting, &c., was \$6938.80, to be paid on account of the moneys due the complainants for debt, interest, and costs, which, on the 5th of August, 1822, amounted to \$8013.16.

This bill is filed against the said John Brugh, Thomas Elliott, and others above named, and prays that they may be decreed to pay the complainants the moneys remaining due to them,

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or may be foreclosed, &c.; and that the several parts of the mortgaged premises held by them may be sold, to pay, &c.

On the 3d of April, 1823, a decree *pro confesso* was taken against Brugh, Ellicott, Lee, Gray, Chamberlain, Rockafellow, and Dills. On the same day, an order was made that Wilson Housel file his plea or answer within 30 days after the service of a copy of the said order, or that the bill be taken as confessed against him.

On the 26th of April, 1823, Wilson Housel put in his answer, admitting the bonds and mortgage, the death of Esther Lowrey and of William McGill, as stated in the bill; and the death of Aaron D. Woodruff, leaving a will of which he appointed the complainants executors; admitting that the complainants exhibited their bill of foreclosure against Housel and the decree and execution thereon; admitting the first sale by the sheriff to Britton, as stated in the bill, but denying that Britton was the highest bidder at that sale, or that the said sale was duly advertised, so far as this defendant knows and has heard, and leaving the complainants to make such proof thereof as they shall be advised; admitting the petition stated in the bill and the proceedings and orders thereon, as stated in the bill; admitting the second sale stated in the bill, but not admitting that the premises were duly advertised or legally sold, but saying that he has been informed and believes, and therefore states, that the said premises so sold, consisted of divers distinct houses, mills, and lots of land, which have been held, and were held at the time of said sale, separately; and that a part of said premises, if sold separately and at a fair price, would have satisfied the said execution; and that the said Jacob Housel, this defendant, did, by writing signed by him and delivered to the said sheriff twenty days before the time appointed for the said sale, elect the part of the said mortgaged premises to be sold and the order of selling the same; and that if the said premises had been so sold, this defendant believes that the same would have brought the full amount due the complainants on their said mortgage.

The answer further states that, on the 9th of May, 1815, the said Housel and his wife, the mortgagors, by deed of that date, for the consideration of \$38.21, sold and conveyed to this de-

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fendant a certain part of said mortgaged premises, butted and bounded as follows, (giving the description,) containing 11-100ths of an acre, with covenants of seizin, and that said Housel had good right to convey the same, and that this defendant should hold the same, free of all former mortgages and other encumbrances, and general warranty, which deed was acknowledged on the 9th of October, 1822; that on the same 9th of May, 1815, the said Jacob Housel, by deed of that date, for the consideration of \$133.60, sold and conveyed to this defendant another part of the said mortgaged premises, butted and bounded as follows, (giving the description,) containing 18-100ths of an acre, with full covenants of seizin, and that he had good right to convey the same, and that this defendant might forever thereafter have and enjoy the same, without the lawful let, eviction or disturbance of any person whatever, and that the same were free of all former mortgages and encumbrances, and general warranty, which deed was acknowledged on the 20th of May, 1820, and recorded on the 9th of October, 1822.

This defendant further answering says, that he has been informed and believes, and therefore states, that there was some agreement, contract or understanding between the said Samuel Britton and the complainants, or one of them, that they, the complainants, would permit the said Britton to buy the mortgaged premises, not conveyed by Housel before the filing of the said bill, as low as possible, at the said last-mentioned sale, upon his agreeing, at all events, to pay the amount due the complainants on the said mortgage, and that the complainants should allow and permit the said Britton to take such proceedings on the said mortgage, in the name of the complainants, as would enable him to raise the difference between the sum for which he might purchase the said mortgaged premises, and the amount due on the said mortgage, out of the other premises contained in the said mortgage, which had been conveyed by said Housel before the filing of the said bill, or some other agreement to the like effect; and that the said purchase was made in pursuance of the said agreement, and that the said bill filed by the complainants against this defendant and others is really for the use and benefit of the said Britton, and designed to enable him to grasp the whole of

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the mortgaged premises, although the part purchased by him is worth considerably more than the whole amount due on the said mortgage; and the answer insists that the said mortgaged premises, not conveyed by the said Housel, if sold separately, in lots, as was elected and designed by Housel, would have brought more than the whole amount due on the said mortgage, and was worth considerably more; nevertheless, the said sheriff, under pretence that no one would bid for it in separate lots, by the direction of the complainants, put up the whole together, and so sold the same to the said Britton. And this defendant insists that the complainants, having filed a bill against the said Housel alone, upon the said mortgage, without making this defendant and others interested in the premises parties, and having sold a part of the mortgaged premises under a decree obtained in said suit, cannot now resort to the lots held by this defendant; and he claims the same benefit as if he had pleaded the said proceedings in said suit, and submits that the complainants are not entitled to any relief against him. And if the court should be of opinion that the complainants are entitled to relief against him, he insists it can only be upon opening the said decree and sale, or permitting this defendant to redeem the said mortgaged premises not conveyed by Housel before the filing of the said first-mentioned bill, which he offers to do, and prays he may be admitted to do, upon paying whatever is due thereon for principal, interest and costs, which he prays may be ascertained under the direction of this court; and that, thereupon, the complainants and the said Britton may be decreed to deliver up and surrender the possession of the said premises so sold as aforesaid to this defendant.

On the 29th of October, 1845, Maria Schenck exhibited her petition, stating the filing of the bill of Elias D. Woodruff and Thomas L. Woodruff, executors of the will of Aaron D. Woodruff, who was surviving executor of Thomas Lowrey, against John Brugh, Thomas Ellicott, and the other defendants therein named, on the 2d of October, 1822, stating the contents and prayer of the said bill and the proceedings in that suit; that Wilson Housel answered the bill, and that a decree *pro confesso* was taken against all the other defendants; that before any

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further proceedings were had in the suit, Elias D. Woodruff, one of the complainants therein, died, leaving Thomas L. Woodruff sole surviving executor of the will of Aaron D. Woodruff, deceased, who was the surviving executor of the will of Thomas Lowrey, deceased.

The petitioner further stated that after the death of the said Elias D. Woodruff, the said Thomas L. Woodruff, surviving executor as aforesaid, assigned to the petitioner the moneys for the collection of which the said suit was instituted, in part payment of certain claims of the petitioner upon the estates of the said Thomas Lowrey and the said Aaron D. Woodruff. That the said Thomas L. Woodruff, surviving executor as aforesaid, has ever since neglected and refused to proceed in the said suit for the collection of the moneys so assigned to the petitioner, and which yet remain due and unpaid. That, by deed dated March 30th, 1826, Mary Gray, one of the defendants in the suit, conveyed that part of the mortgaged premises held and owned by her at the time of the filing of the bill, to Wilson Housel, by whom the same was sold and conveyed to one Samuel Cooley, who now is seized and possessed thereof, and that Mary Gray, after the execution of the said deed, died. That George Dills, another of the defendants, having conveyed that part of the mortgaged premises owned by him, at the time of the filing of the bill, to one Daniel Stiles, also died; and that said Daniel Stiles conveyed that part of the said premises to one Charles Vorhis, who has since conveyed some interest therein to one Peter Vanderbelt. That Thomas Ellicott and Samuel Rockafellow having respectively conveyed away such parts of the mortgaged premises as were held and owned by them at the time of the filing of the bill, left this state prior to 1830, and that the petitioner is unable to discover where they now reside, if living, or whether they are now living. That one Daniel Van Sickle is now seized and possessed of that part of the mortgaged premises formerly owned by the said Samuel Rockafellow, and that Samuel Cooley, John B. Osmun and John Stockton are now seized and possessed of several portions of that part of the said mortgaged premises formerly held and owned by said Thomas Ellicott.

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The petitioner prays that leave may be granted to the petitioner to file a supplemental bill in her own name and the name of the said Thomas L. Woodruff, surviving executor as aforesaid, or otherwise, against the said Samuel Cooley, Charles Vorhis, Peter Vanderbelt, Daniel Van Sickle, John B. Osmun and John Stockton, to make them parties defendant in the said suit, with proper allegations setting forth the matters and facts aforesaid, together with such other matters, either by way of amendment to the said original bill, or as supplemental thereto, as the petitioner may be advised, and with prayer for such relief in the premises as may be adapted thereto.

On the reading and filing of this petition, an order was made, granting leave to file a supplemental bill, according to the prayer of the petitioner.

The supplemental bill was filed November 29th, 1845, by Thomas L. Woodruff, surviving executor of the will of A. D. Woodruff, who was surviving executor of the will of Thomas Lowrey, and Maria Schenck, against John Brugh, Thomas Elliott, Reuben Lee, Henry Chamberlain, Samuel Rockafellow, Wilson Housel, William Vanderbelt, Samuel Cooley, John B. Osmun, John Stockton, Daniel Van Sickle, Charles Vorhis, Peter Vanderbelt and Rachel Graves.

It states the giving of the three bonds by Jacob Housel to Aaron D. Woodruff and William McGill, executors of the will of Thomas Lowrey, and of the mortgage to secure the payment thereof; the death of the widow, Esther Lowrey; the death of William McGill; the death of A. D. Woodruff, leaving a will appointing Elias D. Woodruff and Thomas L. Woodruff executors thereof; the filing of the bill of foreclosure on the 2d of July, 1821, by Thomas L. and Elias D. Woodruff, against Jacob Housel and wife; the proceedings in that suit; the first sale to Britton, for \$8900; the petition of Jacob Housel, John Brugh and others, and the order made thereon; the second sale of the part of the mortgaged premises not conveyed by Jacob Housel, for \$7100, to Britton, and the balance remaining due on the mortgage after the application of the proceeds of that sale; the filing of the second bill by Thomas L. and E. D. Woodruff, executors as aforesaid, against John Brugh, Thomas

Ellicott and the other defendants therein named, for the sale of the parts of the mortgaged premises severally held by them for the payment of the said balance, and the proceedings in that suit.

This bill then states, that shortly after Wilson Housel had filed his answer in the said second suit, Elias D. Woodruff died, and that no further proceedings had been had in the said second suit since his death, he being the principal acting executor of the will of A. D. Woodruff, surviving executor of the will of Thomas Lowrey, and that Thomas L. Woodruff, the surviving executor of the will of A. D. Woodruff, neglected to prosecute the said suit. That after the death of the said Elias D. Woodruff, on or about November 21st, 1833; the complainant Thomas L. Woodruff, surviving executor as aforesaid, assigned to the complainant Maria Schenck the moneys for the collection of which the said second suit was instituted, in part payment of certain claims of the said Maria upon the estates of the said Thomas Lowrey and the said A. D. Woodruff, and delivered the said bonds and mortgage to her. That by deed dated March 30th, 1826, Mary Gray, one of the defendants in the said second suit, conveyed the part of the mortgaged premises held by her, to Wilson Housel, who sold and conveyed the same to Samuel Cooley, who now holds the same, and that Mary Gray has since died. That George Dills, another of said defendants, conveyed the part held by him, to Daniel Stiles, and afterwards died, and that Stiles conveyed the same to Charles Vorhis, who has since conveyed some interest therein to Peter Vanderbelt. That Thos. Ellicott and Samuel Rockafellow having, respectively, conveyed the parts of the mortgaged premises held by them, left this state prior to 1830, and that these complainants are unable to discover where they reside, if living, or whether they are living. That Daniel Van Sickle is now possessed of that part of the mortgaged premises formerly owned by said Samuel Rockafellow, and that Samuel Cooley, John B. Osmun, and John Stockton are now possessed of several portions of that part of the mortgaged premises formerly owned by Thomas Ellicott. That the complainants are informed that William Vanderbelt has become seized of or entitled to the whole or a part of those portions of

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the mortgaged premises so owned by John Brugh and Reuben Lee. That Rachel Greaves holds a mortgage given by one John B. Osmun and wife, on that parcel of the mortgaged premises owned by Thomas Ellicott, as aforesaid, and that William Vanderbelt holds a mortgage given by Charles Vorhis, and one given by Samuel Cooley, on other parcels of said mortgaged premises formerly owned by George Dills and Mary Gray, as aforesaid.

That the balance of \$1074.36, with large arrears of interest, still remains due these complainants.

The bill has the usual prayer for foreclosure and sale, and for process.

To this bill, an appearance was entered for the defendants, John Brugh, William Vanderbelt, Samuel Cooley, John B. Osmun, John Stockton, Daniel Van Sickie, and Charles Vorhis.

Publication was ordered as to Thomas Ellicott, Reuben Lee, Henry Chamberlain, and Samuel Rockafellow.

On the 18th of March, 1846, the demurrer of John Brugh, William Vanderbelt, Samuel Cooley, John B. Osmun, John Stockton, and Daniel Van Sickie, was filed to this supplemental bill. The causes of demurrer assigned are, that the bill is filed, by leave, as a supplemental bill, whereas, the facts set out in it are not material to the matters in controversy in the original suit, as the same are set out in the supplemental bill; that this bill is not any addition, merely, in material matters, to the original bill, in order to supply some defect in it, but is an original bill in its frame and character, and not a supplemental bill, and is, therefore, informal, irregular, and improperly exhibited.

Another cause of demurrer assigned is, that this bill is filed as supplemental to a suit in which one of the complainants died, more than twenty years ago, and the said suit has never been revived by any order of this court.

Another cause of demurrer assigned is, that it appears, by this bill, that Thomas L. Woodruff, one of the complainants, assigned all his interest in the bonds and mortgage, which are the sole matter of controversy in the suit, to Maria Schenck, the other complainant, several years before the bill was filed, and that the said Woodruff, therefore, having no interest in the suit, ought

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not to be a party complainant, and that there is an improper joinder of parties complainant.

And further, that it appears by the bill that the said Thomas L. Woodruff, the complainant in the original suit, has neglected and refused to prosecute the same, and now exhibits a supplemental bill in the same suit, for the same subject matter, which these defendants are advised is irregular and unlawful.

Another cause of demurrer assigned is, that the bill is filed, in part, for the purpose of bringing new parties defendants in the original suit before the court, who became interested in the premises in question after the original bill was filed, which is unnecessary, and subjects these defendants to great expense; and that all the relief prayed for in the supplemental bill, and full relief in the premises, independent of what is therein prayed for, could have been granted and afforded in the original suit, if the complainants are entitled to any.

Another cause of demurrer assigned is, that Maria Schenck has no right to exhibit the supplemental bill, and that upon the facts set forth in this bill, she could only come before this court for relief by original bill, if at all, considering that some twelve years had elapsed, after the bonds and mortgage are said to have been assigned to her, as set out in said bill, before it was exhibited.

Another cause of demurrer assigned is, that the facts and case set out in this bill are within and would be barred by the statute of limitation at law, and that these defendants have been in the peaceable and undisturbed possession for more than twenty years before the said bill was exhibited of the premises, as their own, which are sought to be foreclosed by the said bill, and without any acknowledgment during that time of any right or title to the same in the complainants, or either of them, or any one else.

Another cause of demurrer assigned is, the lapse of more than twenty years, not satisfactorily accounted for, between the filing of the original bill and the exhibiting of the said supplemental bill.

Another cause of demurrer assigned is, that David Williams, Isaac White, William Cooley, William Thomson, Isaac Johns-

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ton and Jacob Moore, of the county of Hunterdon, at the time the said supplemental bill was filed, were interested in and in possession of and claimed title to certain parts of the premises described in the said bill, and ought to be made parties. The general cause of want of equity is then assigned.

A. Wurts and P. D. Vroom, in support of the demurrer, cited *Story's Eq. Pl.*, § 790, 332, 3; 1 *Hoff. Ch. Pr.* 393, 7; *Mitford Pl.* 34, 55; *Hinde's Pr.* 42, 45; 3 *Atk.* 370; 1 *Hoff. Ch. Pr.* 402, note 7, 405; *Story's Eq. Jur.*, § 1050, 1; *Story's Eq. Pl.* 351, *a*, note 2; *Ib.*, § 343, 615, 616; 17 *Ves.* 144; 2 *Mad. Rep.* 53; *Story's Eq. Pl.* 358, § 351; *Ib.*, § 349, note 5, § 7, 19, § 509, note 5; *Ib.*, § 194, 338; 1 *How. Rep.* 161; 9 *Pet.* 416; *Story's Eq. Pl.*, § 484, 503, note 1, § 756, note 5, 757, note 3, 759; 1 *Green's Rep.* 68; 2 *South.* 721; 2 *Story's Eq. Jur.*, § 1520, *a*, and notes; 4 *Kent's Com.* 188; 3 *Harr.* 269; *Angell on Limitations* 25; 2 *Scho. and Lefroy* 630, 6; *Ambler* 645; 3 *Bro. Ch.* 639; 2 *Jac. and Walk.* 188, 191; 4 *Burr.* 1962; 2 *Cond. Eq. Rep.* 137.

F. T. Frelinghuysen, contra, cited *Story's Eq. Pl.*, § 332, 3; 1 *Hoff. Ch. Pr.* 397; *Mitford* 62, 3; *Story's Eq. Pl.*, § 790, 1, 229, 332, 4, 338, 340, 343, 885; 2 *Greenl. Ev.*, § 431; 3 *Bro. Ch.* 639; 6 *John. Ch. Rep.* 663; 4 *John. Ch.* 287.

THE CHANCELLOR. A decree *pro confesso* was taken against all the defendants to the original bill, except Housel, twenty-three years before the filing of the supplemental bill; and Housel answered the original bill twenty-two years before the filing of the supplemental bill; and no step has been taken in the cause in the meantime. The supplemental bill is against some of the defendants in the original suit and against other persons who have become alienees from others of said defendants since the said decree *pro confesso* was taken. There is nothing in what has occurred since the filing of the original bill making a supplemental bill necessary. The only object of it, therefore, must

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be to avoid the effect which the lapse of time might have upon the original suit or upon a new original bill. The complainant cannot be permitted thus to relieve himself from the effect of his own laches.

Demurrer allowed.

ABRAHAM STEVENS, JR., v. PETER M. RYERSON.

1. In May, 1837, A, being about to raise his dam to a height that would cause the overflow of B's land, agreed to buy B's land, and to pay for it on the 1st of April, 1838, the day fixed for the delivery of the deed. On the same day, a further agreement was made between them that, as a compensation for the damages B might sustain until the completion of the agreement to buy, B should occupy and use certain lands of A. In the fall of 1837, A raised his dam, and B took possession of the said lands of A. In October, 1838, B tendered the deed; but A did not pay, and the deed was not delivered. In 1844, B filed his bill, praying that A might be decreed to pay by a day to be fixed, and that, on his failing to do so, the said agreement might be canceled, and A be directed to lower his dam. An order was made that A pay by a day fixed, or that the agreement be canceled. The order prayed as to lowering the dam was denied.

2. A court of equity may decree the cancellation of an instrument, though it has become a nullity, on the ground that its existence may be a cloud on a party's title, or may subject him to litigation at a future period, when the facts may have become involved in obscurity.

Peter M. Ryerson, in May, 1837, being about to raise his dam in the Ramapo river to a height that would cause the water to overflow a part of the farm of Abraham Stevens, Jr., lying on both sides of the river, treated with Stevens for the purchase of his farm, with other lands of Stevens. On the 15th of May, 1837, articles of agreement, under seal, were executed by and between them, by which Stevens agreed to deliver a good and sufficient deed of conveyance on the 1st day of April, 1838, and Ryerson agreed to pay, on that day, \$4500. Ryerson paid ten dollars as part of the consideration money, and the receipt of it was acknowledged in the agreement. After the execution of the articles, and on the same day, a further agreement was made

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between them, and endorsed on the articles, by which it was agreed that, in lieu of, and as full compensation for the damages sustained, or that might thereafter be sustained by Stevens until the completion of the said contract, by reason of raising the dam, Stevens might use and occupy certain lands of Ryerson therein described, such use to continue until the fulfillment of the said contract.

In the fall of 1837, Ryerson raised his dam, so that the water of the pond overflowed about twenty acres of the land so agreed to be sold and bought, and has ever since maintained the dam at that height. On the 9th of October, 1838, Stevens tendered a deed to Ryerson. Ryerson admitted the deed was correct, but did not take it, alleging that he had not the money then, but promised to pay half of it in two weeks, and desired Stevens to wait for the residue till the spring following, promising to pay it then.

On the 11th of April, 1844, Stevens filed his bill against Ryerson, stating the above stated facts, and that, since tendering the deed as above stated, he has frequently applied to Ryerson to pay the money and take the deed, but that he has constantly declined to pay the money, promising always to pay it at some future time.

The bill states further, that the complainant has frequently requested Ryerson to lower his dam so as not to overflow the said land, or to pay the said money; but that he has declined to lower the dam, and neglected to pay the money and take the deed. That Ryerson is insolvent, and unable to pay any damages which might be recovered against him for overflowing the land, but persists in keeping the dam to the height which causes the overflow.

The complainant further states in his bill that, so long as this contract is outstanding, he cannot sell his farm and give a good title to it, because of the said articles of agreement; and that he is advised that he has no remedy but in this court, where a specific performance of the said agreement can be decreed, or the same decreed to be given up and canceled, and the defendant be decreed to lower his dam.

The bill prays that the defendant be directed to pay the money and take the deed, by a short day to be appointed by the court;

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or that, on failure of payment at the time so fixed, the said agreement may, by decree of the court, be canceled, and the complainant be relieved therefrom, and that the defendant may be directed, by order of the court, to lower his dam, so as not to overflow, &c.; and that the defendant, his agents, &c., be then enjoined from overflowing the complainant's land.

The defendant having failed to answer, witnesses were examined and documents produced to prove the allegations of the bill.

The cause was brought to a hearing on the bill and the depositions and exhibits.

A. S. Pennington, for the complainant.

The bill is with a double aspect; to enforce performance of the agreement to purchase; and if the defendant will not perform, then that he be compelled to restore the complainant to his original position by taking down his dam. We do not ask an injunction now, but if, after the time the court shall give him to pay the money, he fails to do so, then we ask to be restored to our original position. True, by the supplemental agreement Stevens was to occupy certain lands in lieu of damages, and has occupied them till this time. We do not ask for damages; but are things always to remain in this state? We cannot sell, for there is a cloud on our title. Ryerson cannot perform; he cannot pay. Seven years elapsed before bill filed; and three years have run since, and only \$10 paid on the agreement.

We ask the court to fix a specific time within which Ryerson shall pay, and that, in default thereof, he be compelled to lower his dam.

He cited *Drewry on Inj.* 260; 10 *Ves.* 192; 4 *Sim.* 13; 8 *Ib.* 193; 1 *Ves.* 542; 2 *Ib.* 543; 2 *Green's Ch.* 353; 1 *Mylne and Keen* 155; 6 *Eng. Ch. Cond.* 558; 2 *Atk.* 83.

B. Williamson, *contra*.

THE CHANCELLOR. If it would be within the proper exer-

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cise of the power of this court to make an order which, by its terms, would, either directly or indirectly, compel the defendant to lower his dam, is this a case in which the power should be exerted? The dam was raised with the assent of the complainant, he relying on the agreement of the defendant to purchase his farm; and an arrangement was, at the same time, made between them, by which the complainant was to occupy certain lands of the defendant in lieu of, and as a full compensation to him for the damages he might sustain by the raising of the dam, until the completion of the contract; the use of the said lands by him to continue until the fulfillment of the contract. The dam was raised shortly after the agreement to purchase was entered into, and before the time fixed for the delivery of the deed and payment of the money. The complainant took possession of the lands he was to use as a compensation for damages, and has occupied them ever since, and still occupies them. The deed was not tendered until the fall of 1838. The defendant promised to pay half the purchase money shortly, and desired the complainant to wait until the following spring for the residue. Matters remained in this situation for seven years from the date of the agreement, except that the complainant frequently applied to the defendant to pay the purchase money and take the deed.

Under these circumstances, I think the court should not interpose by way of injunction, or order in the nature thereof.

But should the defendant be permitted to delay indefinitely the fulfillment of his agreement to purchase, because the complainant took possession of lands, the use of which was to be in lieu of damages, and which use was to continue until the fulfillment of the agreement? I think not. It would be a harsh construction of the second agreement to say that it bound the complainant to wait indefinitely the pleasure of the defendant as to the fulfillment of the agreement to purchase, and that the complainant's agreement to sell should stand good against him as long as it suited the convenience of the defendant. This could not have been the meaning and spirit of the second agreement, and it is just and equitable that a limit should be fixed within which the defendant should pay the money, in fulfillment of his part of the agreement, or the agreement cease to bind the complainant. If

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it be said that on the tender of the deed and the omission of the defendant to pay, the agreement for the sale became null, and ceased to bind the complainant, it may be answered that a court of equity may decree a delivery and cancellation of an instrument, though it has become a nullity, on the ground that its existence may be a cloud on a party's title, or may subject him to litigation at a future period, when the facts may have become involved in obscurity. 2 *Story's Eq.*, § 705.

In this case, as effected by the second agreement, the danger that the complainant might be subjected to future litigation, after an indefinite lapse of time, particularly if he continues to use the lands he is using in lieu of damages, (and I do not see that he is bound to give them up,) is apparent. And if he should sue at law for damages, he would be subjected to embarrassment while the agreement to sell exists and he continues to use the lands he is using in lieu of damages. The defendant has put the complainant in this position by his failure and fault in not complying with his agreement to purchase, and the complainant should be relieved from this position.

Part of the relief prayed by the bill, that is to say, that a time be fixed within which the defendant shall pay the money and take the deed, and that in default thereof the complainant's agreement to sell be decreed to be no longer binding and be given up to be canceled, will be given. Beyond that, the complainant will be left to his remedy at law.

Order accordingly.

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SUSAN WRIGHT v. ELIAS W. CONOVER

The statutes of New Jersey, limiting actions for land, do not apply to dower.

Susan Wright, widow of Barzillai Wright, late of Trenton, deceased, exhibited her bill on the 9th of July, 1846, against Elias W. Conover, stating that the said Barzillai was, in his lifetime, and during the time he was married to the complainant, seized in fee or in tail of divers freehold estates, situated in the county of Mercer, and that he died on or about March 1st, 1838, leaving the complainant, his widow, him surviving, whereby she became entitled to her dower in the said freehold premises. That in the lifetime of the said Barzillai, a part of the freehold estates of which he was seized was levied upon by the sheriff of Hunterdon, by virtue of divers executions in his hands against the said Barzillai, and that, on or about November 1st, 1820, the said sheriff sold at public sale a part of the freehold estate of the said Barzillai, consisting of about fifty-five acres, situated in the township of Lawrence, in the county of Mercer, which said part was then and there bought by one Mahlon Milner, and that Milner, afterwards, on or about November 20th, 1820, received a deed therefor from the said sheriff, and entered into the possession thereof. That the title to the said premises has since passed by various conveyances to Elias W. Conover, who now holds the same in fee simple, as the complainant is informed and believes, subject to the right of dower of the complainant therein. That the said tract of land is now in the actual occupancy and possession of one Aaron Tindall, as a tenant, as the complainant is informed and believes, of the said Conover. That the title deeds and evidences and writings relative to the said premises and estate have come into the hands and possession of the said Elias W. Conover. That on or about March 1st, 1846, the complainant caused a written notice to be served on the said Conover to set off or cause to be set off and assigned to the complainant, and let her into the possession and enjoyment of one-

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third part of the said freehold estate, as and for her dower aforesaid, but that he refuses or declines so to do, and refuses to produce the title deeds, evidences and writings, or any of them, relative to the said freehold estate; wherefore the complainant is unable to proceed at law to establish her said demand.

The bill prays that Conover may answer, &c., and discover and set forth a full and true description of such freehold estate, with all the circumstances and particulars thereof or relative thereto; and that an account may be taken of the rents and profits of the said freehold estate, which have accrued since the said demand of dower; and that one-third part thereof may be paid to her; and that one-third part of such freehold estate may be assigned and set off to her for her dower, or other widow's estate; and that she may be let into the immediate possession and enjoyment thereof, and decreed to hold the same for her life; and that Conover may be decreed to produce all title deeds, evidences and writings relative to the said freehold estate, in order to effectuate the purposes aforesaid.

To this bill the defendant has pleaded in bar, that the said Barzillai Wright died more than twenty years before the filing of the complainant's bill, or the serving this defendant with process to appear and answer the same; and that if the complainant ever had any right or title to dower or thirds of and in the said premises, or ever had any cause of action against him, for or concerning any of the matters in the bill mentioned, which he doth in no sort admit, the said right or title, and the said cause of action, did accrue more than twenty years before the filing of the complainant's bill, or the serving this defendant with process to appear and answer the same; and, therefore, he doth plead the act entitled, "An act for the limitation of actions," passed February 7th, 1799, and prays the benefit of the said statute for the limitation of actions.

A replication was put in to this plea, but afterwards it was agreed between the solicitors, by writing, filed with the clerk, that Barzillai Wright died July 17th, 1823; and that the truth of the plea was, therefore, admitted by the complainant's solicitor; that the replication be withdrawn, without costs, and that the cause proceed to hearing on the bill and plea; and that if, upon

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the hearing, the plea be allowed, it be considered as proved, and a final decree made thereon.

C. S. Green, in support of the plea. He cited 1 *Harrison's N. J. Rep.* 107; 1 *Constitutional Rep. of S. C.* 112; 3 *Dessau*. 555.

W. Halsted, contra. He cited *Park. on Dower* 311-12; 3 *Kent's Com.* 70, notes; 1 *Swift* 85; 4 *N. Hamp. Rep.* 109; 2 *Gill. and John.* 468; 8 *Johns. Rep.* 103; 1 *Dev. and Bat.* 213; 10 *Yerger* 339; *Co. Lit.* 115, a; 7 *Metcalf's Rep.* —; 9 *Ves.* 222; 2 *Ves., Jr.*, 122; 2 *Bro. Ch. Rep.* 620; 1 *Cruise's Dig.* 159; *Co. Lit.* 36, a; 7 *Johns. Rep.* 247; 4 *Mass. Rep.* 388; 9 *Ib.* 13; 16 *Ib.* 293; 19 *Johns. Rep.* 197; 20 *Ib.* 411; 2 *Show.* 198; *Bull. N. P.* 117; *Angell on Lim.* 381, 379, 404, 415, 452; 2 *Allison* 72, 74; *Gilbert on Tenures* 26; *Watkins on Descent* 100; 2 *P. Wms.* 703-4; *Cro. Jac.* 111.

THE CHANCELLOR. I am of opinion that the claim for dower is not within the spirit of the statute of limitations, nor within its policy, or the evil intended to be remedied by it, and that the legislature never intended to include dower within its provisions, or supposed it was so included.

Dower has a limitation in the nature of things. It is the use of a third part of the lands during the life of the widow only. In a large proportion, perhaps a majority, of the cases, death puts an end to the enjoyment, and to the claim of dower, within twenty years from the death of the husband. There is no consideration of public policy requiring any other limitation. It is a claim of a peculiar nature, entirely different from claims for debt and from asserted titles to land. The amount of a debt is yearly increasing, and there is a policy in limiting a time within which it should be presumed paid. If one has title to land which another is holding adversely to him, there should be a limitation of time within which he should bring his action for it. The land may become more valuable by improvements put upon it by the person in possession; and the taking it from him after the lapse of years may inflict a heavily increased loss. But the value of

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the right of dower to the widow, and the burden of it to the owner of the land, is becoming less and less every year of her life. The alienee of the husband can put what improvements he pleases on the land: the widow gets dower only according to the value of the land at the time of the alienation.

A purchaser from the husband knows he buys subject to the wife's inchoate right of dower, and the widow can recover damages—that is, the value of the dower—only from the time she demands her dower. If she fails to demand her dower for twenty years, the purchaser has been relieved of the burden during that time. Does that furnish any reason why he should be relieved from it for the remnant of her life?

Children, where the father died seized, may, in consideration of the mother's right of dower, and by arrangement with her, have supported her for twenty years, and may then fail to support her. Is she barred of her right to have her dower set off to her?

At law, if a dowress dies before her right is established, her personal representatives have no remedy for the mesne profits. The rule is the same in chancery, as against a purchaser from the husband.

Neither the title of the heir-at-law, nor that of the alienee of the husband, is adverse to the title under which the widow claims. They all claim under the title of the husband. The estate of the widow is a continuation of that of her husband, and, upon assignment, she is in by relation, from her husband's death. 4 *Kent's Com.* 62.

The right to dower is a mere right, which can be neither aliened nor sold on execution. The law casts the freehold on the heir, and the widow has no estate in the land until her dower is assigned. 4 *Paige* 448; 17 *John. Rep.* 168, 9; 20 *Ib.* 411.

She has no estate or right of entry in the whole, and none in any particular part until her dower is assigned by metes and bounds, and, when that is done, the estate does not pass by the assignment, but she is in, in intendment of law, of the seizin of her husband. 4 *Kent's Com.* 68.

It is said that dower is within the letter of our statute of limitations.

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If it were within the letter, yet if it be not within the spirit of the statute, it should not be subject to it.

But is it within the letter of our act? Sections 9 and 10 of our act for the limitation of actions, provide that no person having any right or title of entry into any lands, shall make entry therein but within twenty years next after such right or title—*i. e.*, right or title of entry—shall accrue, and that every action for lands, real, possessory, or mixed, shall be brought within twenty years next after the right or title thereto—*i. e.*, the right or title of entry—or cause of such action, shall accrue.

The two sections together, amount to no more than this, that no action for lands founded on a right or title of entry, shall be brought after twenty years, &c. The widow has no right or title of entry into any lands until after the dower is assigned.

The right is a mere inchoate, contingent charge, and it remains contingent after the husband's death, at least as against a purchaser from the husband. She cannot bring ejectment for it—ejectment is a mixed action for lands, and satisfies that word in our statute—and if she dies before she can compel an assignment, the holder of the lands is relieved, and her personal representatives cannot recover the mesne profits from the husband's alienee; and, during her life, if she makes no demand of her dower from the husband's alienee, she cannot recover the value thereof.

The statute of 21 *Jac.* 1, which enacts that "no person shall make entry upon any lands but within twenty years next after his right or title shall first accrue," and the statute of New York, which enacts that no action for the recovery of any lands shall be maintained unless the plaintiff, his ancestor, &c., was seized or possessed thereof within twenty years, are as broad in their effect as our statute, and yet are held not to include dower; and so are the statutes of several other states, which are held not to include dower.

Dower is not included because the widow has no right or title of entry until her dower is assigned by metes and bounds.

By a late statute in New York, dower has been subjected to limitation. How is it done? It is by requiring dower to be demanded within twenty years from the death of the husband. So

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by a late statute in England, 3 and 4 *William IV.*, *ch.* 27, dower has been limited. It is done by providing that no suit for dower shall be brought within twenty years from the death of the husband. This shows that dower is not within statutes limiting actions for lands founded on right of entry or title, and in which the doctrine of adverse possession is involved.

If our legislature shall be moved to enact such a limitation of the suit or demand for dower, they will have an opportunity of deciding whether dower is within the policy of statutes of limitation and whether there is any necessity or propriety of fixing a limitation.

Dower is highly favored. It has been well said that dower is not only a legal right, but a moral right to be provided for and have a maintenance and sustenance out of the husband's estate. That the widow is in the care of the law, and a favorite of the law. 1 *Story's Eq.*, § 629.

Our legislature have provided that where the husband did not die seized, as where he aliened in his lifetime, which is the case here, she may sue for and recover her dower, with damages, that is to say, the value of her dower, from the time she demands her dower. There is no limitation as to the time of the demand. She may demand it at any time during her life. This bill goes for the value of the dower since the demand of dower, and for a third of the land to be now set off, and the plea is to the whole bill. The demand of dower was not made until March, 1846. No action for the value of the dower accrued until then, and then only for the value after that time. By what rule can time, elapsed before an action accrues, be a bar to it? And if after demand she is entitled to the value of the dower from that time, which is equivalent to the dower itself, why is she not entitled to the dower itself from that time? Can she be confined to an action for the damages or value?

This shows the incongruity which would arise from construing our statutes limiting actions for lands to apply to dower.

Plea overruled.

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SOLOMON ANDREWS v. CHARLES FORD ET AL.

Re-taxation of costs.

An injunction was allowed in this case on the filing of the bill. In January, 1845, a demurrer to the bill was filed by the defendants, which was overruled, with costs, in April, 1845.

In February, 1845, on affidavit that Benjamin Maurice and Charles F. Maurice, two of the defendants, resided in the county of Ulster, in the State of New York, and on motion of counsel for the defendants, a *dedimus potestatem* to take their answers was ordered. In July, 1845, the answer of the said defendants was put in in the usual way, having been sworn to before a master in this state. In March, 1846, the injunction was dissolved, with costs. The replication was filed in December, 1846. The defendant's solicitor set the cause down for hearing at the June Term, 1847. On the 3d of July, 1847, an order was made, on motion of the solicitor and counsel for the defendants, "by and with the consent of the solicitor of the complainant," that the complainant's bill be dismissed, with costs, to be paid by the complainant.

In taxing the defendants' costs the clerk taxed costs for their demurrer, and for their motion for the commission or *dedimus potestatem*, and for drawing and sealing the commission, and for notice of hearing, rule for hearing and setting down cause, and for enrolling proceedings, and for four term fees.

A motion was made before the Chancellor to re-tax the costs.

J. S. Green, for the motion.

P. D. Vroom, contra.

THE CHANCELLOR. The costs taxed for the demurrer must be struck out. The several items taxed for the costs of the *dedimus potestatem* to take the answer of the non resident defend-

ants must be struck out, in analogy to the costs of commission to examine witnesses abroad or in another state.

It is for the complainant's solicitor to set the cause down for hearing; on his failing to do so, his bill may be dismissed, with costs. The costs taxed for noticing the cause and for the rule for hearing and setting down the cause must, therefore, be struck out.

The 51st section of the Chancery practice act provides, that when any suit shall be dismissed in pursuance of any consent or agreement of the parties for that purpose, no enrollment of the proceedings shall be necessary, nor shall any fees be allowed or taxed therefor; but either party may, at his own expense, require the same to be enrolled. The order dismissing the bill, in this case, states that it was made by and with the consent of the solicitor for the complainant. The fees for enrolling, therefore, cannot be taxed against the complainant. Four term fees are taxed, including the term fee taxed on the dissolution of the injunction. The act to regulate fees provides that no more than three term fees shall be allowed in any cause. The four term fees taxed are all term fees in this cause. One of them must be struck out. The complainant's costs on overruling the demurrer must be taxed against the defendants, and be deducted from the amount of the costs taxed against the complainant.

CASES IN CHANCERY.

DECEMBER TERM, 1847.

ISAAC STAATS v. REUBEN H. FREEMAN AND WIFE.

1. Injunction allowed restraining waste on a farm conveyed by the complainant to the defendant, on bill alleging that a deed for the farm was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance, and praying that the deed may be declared void.

2. And on answer and motion to dissolve, the injunction was retained until the hearing of the cause.

On the 11th of February, 1846, Isaac Staats exhibited his bill, stating that his father, Abraham Staats, on the 17th of August, 1819, made his will, devising to the complainant the one-half of his homestead farm, containing about 130 acres, in fee, and that his said father died on the 4th of May, 1821. That immediately after his death, the complainant went into possession of the said farm, and continued in the peaceable and uninterrupted possession thereof until the time after-mentioned in the bill. That about the year 1814 he married Martha A. Ross, by whom he had a daughter, Margaret. That his said wife died November 6th, 1838, leaving the said Margaret her surviving. That the said Margaret, in 1837 or 1838, intermarried with Reuben H. Freeman, a man with pretensions to education and respectability, but destitute of the means of supporting himself or his wife.

That the complainant took the said Freeman into his house after his said marriage, and supported him and his wife and two children of their marriage until December, 1840, when the complainant, who was the owner in fee of a valuable farm of about 100 acres, and worth \$6000, which he had acquired by his own labor and industry, adjoining the farm so devised to him by his

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father, thought it advisable to urge upon his son-in-law the necessity of earning his own support. And the complainant, in order to provide a comfortable support and maintenance for his daughter and her children, did, on the 21st of April, 1838, convey to his said daughter the said farm of 100 acres, and did, also, give to said Freeman and his said daughter, personal property to the amount of \$1000.

That Freeman and his wife continued to reside on the said farm so conveyed by the complainant to his said daughter, Freeman's wife, until the time in the bill after mentioned.

That, during the time Freeman resided with the complainant, after Freeman's said marriage, the complainant gave to said Freeman sums of money from time to time, amounting in all to about \$300, as near as the complainant can recollect; and the complainant also made a conveyance to said Freeman of one-fifth of a tract of land, with the improvements thereon, called the basin property, lying along and adjoining the Delaware and Raritan canal, being a part of the farm so devised to the complainant by his said father; which fifth was worth, at the time of the said conveyance, at least \$1000.

That, in November, 1840, the complainant married Maria Matthews, by whom he has had one child, a son, named Abraham. That, soon after the complainant's said marriage, the said Freeman and his said wife insinuated to the complainant and other persons, that the complainant's said wife Maria was not faithful to her marriage vows; that she was a bad woman, and would ruin the complainant, and strip him of all his property.

That, by these repeated insinuations and charges against his said wife and the complainant, who was then in the habit of drinking ardent spirits to intoxication, believing the stories so told by Freeman and his wife, the complainant was thereby induced to turn his said wife Maria from his house.

The complainant now charges that the said insinuations and charges so made against his said wife were false and unfounded, and were made for the purpose of inducing the complainant to convey away all his property into the hands and possession of the said Freeman and wife.

That the complainant, after he had turned his said wife from

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his house, continued to drink ardent spirits to great excess ; and while his wife was turned from his house, as aforesaid, the said Freeman frequently urged the complainant to apply for a divorce from his said wife, at the same time charging her with loose and unfaithful conduct, and that she would ruin the complainant in his pecuniary circumstances. That the complainant, being at that time and long after in a constant state of intoxication, gave a listening ear to the said charges and insinuations so made by Freeman and his wife against the moral character of the complainant's said wife.

That Freeman, during the time the complainant's said wife was absent from complainant's house, carried the complainant to the office of a counselor-at-law for the purpose of arranging the preliminary proceedings in order to apply for and obtain a divorce from his said wife Maria. That the said counselor, on being advised with on the subject of the divorce, considered the charges against the complainant's said wife too vague to be made the foundation of an application for a divorce.

That said application for a divorce being abandoned by said Freeman, he, Freeman, still urged the complainant, and while the complainant was in a state of intoxication, to convey to his wife the farm so devised to the complainant, and to confess a judgment to him, Freeman, for an amount sufficient to cover all the complainant's personal property, the complainant being then owner of and in possession of personal property worth \$2000. That said Freeman urged that, if the complainant did not so convey away his farm and confess said judgment, the complainant's wife had run him in debt, and would run him in debt, and that all his personal property would go to satisfy the debts contracted by his said wife.

The bill charges that it was not true that his said wife had run him in debt ; that she had not done so ; nor was she running him in debt, as stated and urged by Freeman.

That, on the 2d of September, 1842, and while the complainant was in a state of gross intoxication, and with the idea impressed upon his mind by said Freeman that his said wife would ruin him, executed a deed to his said daughter, the wife of said Freeman, for the farm so devised to him by his father ; and did,

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at the same time, give his promissory note to the said Freeman for \$1600, or thereabouts, and executed a warrant of attorney to confess judgment thereon.

The complainant charges that, at the time he executed the said note and warrant of attorney, he did not owe Freeman a cent, and that the said conveyance and note were given without any consideration.

That after the said deed was executed, and before the delivery thereof, and while it was yet in the hands of the scrivener, the scrivener advised the complainant not to deliver the said deed, but to wait a few days before the delivery thereof; and that he, the said scrivener, would take the said deed home with him and keep it some days, and then, if the complainant, on reflection, ordered it to be delivered, he, the said scrivener, would do so, but not till then.

That said scrivener did take said deed home with him to keep subject to the complainant's order.

That while said deed was in the hands of said scrivener, in order to induce the complainant to deliver it to said Freeman or to his, Freeman's, wife, Freeman, in order further to influence the complainant's mind against his said wife Maria, and for the purpose of depriving her of a support and maintenance, and to defraud the complainant out of his said farm, obtained the possession of the account book of the complainant, and, where he, Freeman, knew the complainant would see and read it, wrote therein the following note, to wit: "September 7th, 1842, Samuel has been in Hunterdon, and, so far as he can learn, Maria's character has been base, that she has no money up there, that Mrs. Nixon says that she is filthy and nasty, that she was at her house, that her brother would not have her there because she abused him and his wife, and accused her of stealing her muslin and flannel."

The bill charges that the matters and things set forth in the note above written are false and unfounded, and known by said Freeman to be so at the time he wrote the said note. That Freeman wrote said note for the purpose of fraudulently getting possession of the said deed which was then in the hands of the said scrivener subject to the order of the complainant.

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That the complainant has understood and believes that, while he was in a state of intoxication, Freeman prepared an order, addressed to the said scrivener, to deliver the said deed. That he has no knowledge whatever of seeing and signing said order for the delivery of said deed, and charges the said order to be a forgery ; or, if the complainant was induced to sign it, it was at a time when he was so much intoxicated that he did not know the consequences of such an act.

That the said deed was delivered by the scrivener upon the receipt of the said order.

That at the time he executed the said deed, and at the time he executed the said note and warrant of attorney, he had not power of mind to comprehend the contents and effects thereof ; and that they were not executed from his own motion and free will, but by the suggestions compulsions and contrivance of the said Freeman and his said wife, or one of them.

That immediately after the said deed was executed, and before the delivery thereof, Freeman and his wife moved into the said house and upon the farm so devised to the complainant, and that Freeman has had the rents, issues and profits thereof from that time, and continued to occupy, possess and enjoy the same.

That Freeman caused judgment to be entered against the complainant, in the Supreme Court, on the said note, by virtue of the said warrant of attorney, and caused execution to be issued immediately thereon, and placed in the hands of the sheriff of Somerset to be executed.

That the said sheriff, in virtue of said execution, caused all the personal property of the complainant to be exposed to sale, and that it was all bought at said sale by said Freeman, at a nominal amount, and that Freeman took possession thereof and continues to enjoy the same.

That Freeman is now cutting down a large quantity of timber growing on said farm, for the purpose of selling the same to his own use, and for the purpose of making rails to fence the farm which the complainant voluntarily conveyed to his said daughter, the wife of Freeman ; and that Freeman gives out that it is his intention to cut down the whole or nearly the whole of the tim-

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ber growing on said farm. And that Freeman, since he so obtained possession of the said farm, has carted off the same great quantities of the soil and manure made thereon, and applied it to the improvement of the land which the complainant voluntarily conveyed to his said daughter.

The bill prays that Freeman and his wife may be decreed to re-convey the said farm to the complainant; that the said deed therefor may be declared void; that the judgment so confessed may be declared void; that Freeman may be decreed to account to the complainant for the value of the personal property so sold by the complainant, and for the rents, issues and profits of the said farm, and for the said manure and soil; and that the said Freeman may be enjoined and restrained from committing further waste upon the said farm.

The injunction was granted.

On the 20th of January, 1847, Freeman and wife filed their answer. They admit the devise stated in the bill; that the complainant, after the death of his father, though not immediately, entered into possession of the lands and premises devised to him, and continued in full possession thereof for several years; but they say they have understood, and believe, and therefore charge, that immediately on the death of the complainant's father, the widow of his said father was in possession, and remained in possession, during her life, as she was authorized and empowered to do by the terms of the will of complainant's father; and that it was not until her death that the complainant entered into possession of the said lands and the one-half part of the buildings thereon.

They admit the marriage of the complainant, in 1812, and not in 1814, as stated in the bill, and that the defendant Margaret is his daughter; the death of the complainant's first wife; and their own marriage in the month of August, 1834, and not in 1837 or 8, as stated in the bill.

Freeman, answering for himself, denies that, at the time of his marriage, he was entirely destitute of means or ability to support himself and family. On the contrary, he most distinctly charges that such allegation is unjust and untrue; and in like manner he denies that upon his marriage he was by the complain-

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ant taken into his house, and afterwards, with his wife and children, supported by the complainant until December, 1840; the contrary of all which he charges to be true. That at his marriage he had completed his professional studies, and was qualified and competent to engage in the business of instruction or teaching, especially of the young; and that he had in hand, of his own proper moneys, several hundred dollars; and that having been treated with rudeness and incivility by the complainant, (impelled and actuated by an evil agent and influence readily imagined from the admissions in the bill, and which this defendant cannot avert to without grief and mortification,) this defendant, yet in the lifetime of his mother-in-law, left the residence of the complainant, with the design of making, so soon as he should be able, ultimate and final arrangements for the separate and independent support of himself and family.

That, with such purpose and design, he removed, in the fall of 1836, to Newton, Sussex county, and engaged in the business of a teacher for two or three months, and while so employed, upon a visit to his family, was urged by complainant to abandon his said business at Newton, and return to the vicinity of complainant's residence, the complainant then and there promising him, as an inducement for such return, to convey to his wife, in fee, a lot of land of ten acres, lying on the west side of the road leading from Boundbrook to Middlebush, and not adjoining the homestead farm of the complainant, as is stated in the bill, and would largely contribute to the building of a convenient and comfortable house thereon, for the accommodation of this defendant's family, and to be his property, in which this defendant might resume and prosecute his business of a teacher of youth.

That this defendant, relying on the faithful performance by the complainant of such explicit and solemn agreement, returned, and soon after commenced the erection of a house on said lot, and expended thereon, of his own moneys, \$450, and incurred debts on account thereof to \$1200, which debts the complainant, from time to time, neglected and refused to assume and pay, meanwhile leaving this defendant exposed to the clamorous demands and solicitations of impatient creditors, in direct violation of said solemn and explicit agreement before stated. That this

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state of things remained unchanged till about April 1st, 1838, when the complainant borrowed of George Windsor \$1000 and applied it to the liquidation of the aforesaid debts, and, induced by the repeated solicitations of his wife, Martha Staats, afterwards executed a deed for 4 66-100 acres to his daughter, the wife of this defendant, in fee, in lieu of a conveyance of ten acres to this defendant, as was by the complainant promised as aforesaid.

That during the summer of 1840, this defendant, influenced by the abusive and unstable conduct of the complainant, again determined to withdraw himself from the neighborhood of complainant, and with the view of selecting a proper location, devoted between one and two months to a visit to and examination of the western part of New York, and that shortly after his return, that is to say, within two or three months, according to this defendant's best recollection, the complainant, without the knowledge of this defendant, and in fulfillment of a solemn and express promise made to his said wife during her last illness and shortly before her death, made and executed a conveyance of the residue of the aforesaid farm, of which the said ten acres, promised as aforesaid, were part, by the complainant purchased as aforesaid, to his daughter, the wife of this defendant, in fee; but in violation measurably of the spirit of such express and solemn promise, nevertheless withheld the delivery of said deed, until certain terms by the complainant propounded were complied with or assented to by this defendant, viz., that this defendant should gather the growing crops of both the aforesaid farms, estimated to amount to \$800 or \$900 in value, allow the complainant to take of the same sufficient for the consumption of his family and stock, and apply the residue to the payment of the debts of the complainant particularly incurred in the erection of the said house, which said debts, amounting to \$1600, the complainant stipulated should be assumed and paid by this defendant, and that the complainant should have, to his own use, the one-half of the winter grain and of a thirty-acre field of grass, part of said farm, the season then next ensuing.

He avers that the said terms were complied with on his part, but that subsequently the complainant refused to allow the proceeds of the said two farms to be divided as above stipulated by

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him, and applied the whole to his own use, to the detriment and loss of this defendant of \$600 or \$700. And that this defendant made and executed to George Windsor a bond and mortgage, said mortgage containing said premises, to secure \$1600, being the complainant's debts, and \$1000 thereof, or rather \$1400 thereof, borrowed by the complainant of the said Windsor, as before stated, with several years' unpaid interest thereon, and that afterwards, a barn being built on said premises, the said debt was increased thereby, and the interest in arrear on said mortgage, to \$2500, and a bond and mortgage to secure that amount executed by this defendant and his wife to Hannah and Maria Ten Eyck, of New Brunswick, the interest of which has been paid by this defendant, and that so much of the consideration of this last mortgage as was needful was applied to the payment of said mortgage to George Windsor.

He says, in correction of the erroneous or inconclusive statements of the bill in this behalf, that he remained with his family in the occupancy of said house, built as aforesaid, for four or five months, when, at the request of the complainant, he with his family removed to the house occupied by the complainant, to superintend the farming business of the complainant, and to take care of the wife of the complainant, then in feeble and declining health.

These defendants deny that during the time of their residence with the complainant, he gave to said Freeman sums of money amounting to \$300, or that he gave to these defendants personal property amounting to \$1000, or that the fifth part of the tract called the basin property was worth \$1000; on the contrary, they say that the complainant gave to his said daughter, during that period, property to the amount of \$150 or \$160 only, \$65 of which was in the proper moneys of the mother of his said daughter, so deemed by the family of the complainant.

The defendant Freeman charges the truth to be, in that behalf, that the complainant, having an unsettled controversy, in 1834, with the Delaware and Raritan Canal Company, offered this defendant \$100 if he would obtain a satisfactory settlement of said controversy; and he avers that he earnestly engaged in said undertaking, at such request, and in the prosecution thereof

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was obliged to visit Princeton eight or ten times, and New Brunswick more frequently, and finally succeeded in arranging said controversy to the complainant's satisfaction, after great pains and difficulty; and, in the arrangement, obtained from the company the right to erect a basin adjacent to said canal, on the lands of the complainant. And, upon the like further request of complainant, this defendant superintended the making of such basin, and when it was completed, the complainant sold it, with an adjacent lot of eighteen and three-quarter acres, for \$3775; and in the conveyance thereof caused the name of this defendant to be inserted as one of the grantors, as an acknowledgment and compensation to the amount of \$755, and not \$1000, as charged in the bill, for the specific services and labors of this defendant of the nature before stated, as this defendant then supposed; such acknowledgment and compensation being freely and voluntarily made by the complainant, without any demand or request made or intimated by this defendant, or with his knowledge inducing the same.

They admit, with grief, the complainant's marriage with Maria Matthews.

But the defendant Freeman answering for himself, denies that, soon after said marriage, or at any time, he insinuated to the complainant or to other persons, that the said Maria was not faithful to her marriage vows; that she was a bad woman, and would ruin complainant and strip him of his property.

And the defendant Margaret is constrained by self-respect to deny that such charges and insinuations were made by her, or that by any means whatever the complainant was or could have been induced by these defendants, or either of them, to credit and believe such statements. On the contrary, they allege that, had they not been restrained therefrom by the relation subsisting between themselves and complainant, and by delicacy and propriety, yet they solemnly aver that the notoriously bad character and conduct of the said Maria made any such allegations entirely unnecessary.

And the defendant Freeman says that, before he ever saw or knew said Maria, the complainant, before his unhappy and disgraceful marriage with her, deliberately characterized her to this

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defendant and to others as the lowest of the low ; stated that she was then pregnant by a person he named, and that he never would marry her. And this defendant avers that, in less than four months after said marriage, the said Maria was delivered of the child called by the complainant in his bill his child.

These defendants say that the charges aforesaid, though not made by them, are true.

Freeman denies that he urged the complainant to apply for a divorce, with or without the charges that his said wife was loose and unfaithful, and would ruin him.

The defendants aver that the said Maria, after the marriage, and after she was brought home by the complainant, was frequently intoxicated, and neglected household matters, &c., and that the provisions laid up, &c., were exhausted by midsummer. That, in this state of affairs, in July, 1828, the complainant and his said wife quarreled, and she withdrew from the home of complainant, after complainant had deliberately declared that if she did so she should never return.

They declare that such quarrel and withdrawal of said Maria were wholly uninfluenced by any act, procurement, or advice of them or either of them. That, on the day after said quarrel, the said Maria returned, with her sister ; and that the complainant, of his own motion, and without any interference or influence by any person, of any kind, so far as these defendants have ever known or believed, refused to admit her into the house, and she accordingly went away.

They say they have heard and believe that said Maria, thereupon, consulted counsel as to her marital rights and the mode of enforcing a support from the complainant. Then it was, as these defendants aver, that the complainant, of his own motion, took Samuel Van Arsdale with him, went to Somerville, and caused to be inserted in one or both of the newspapers there published, a notice or advertisement to the effect that he would not pay any debts said Maria might contract.

Freeman says that the complainant, in a state of sobriety and recollection, requested him to go with him to counsel ; and that, on such request, and not otherwise, he went. That the object was to advise on the practicability of the complainant's obtain-

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ing a divorce. That this defendant went first to the office of William Thompson, Esq., with whose view of the case the complainant was not satisfied, and himself proposed and went thence to the office of T. A. Hartwell, Esq., and advised with him, and at his request produced witnesses who were examined by said Hartwell, and a note of their testimony was taken by him in writing, on which occasion the complainant withdrew and became grossly intoxicated.

This defendant avers, that the complainant, acting, as this defendant supposed, under the advice of his counsel, certainly not under the advice of this defendant, also sent said Van Arsdale to Hunterdon, in which county the complainant had been informed, as this defendant understood, the said Maria had formerly lived, to procure testimony or information, as the complainant stated, in aid of his application for a divorce.

The defendants distinctly charge that these several steps were taken by the complainant uninfluenced in any way by them or either of them.

They say that while they lived apart from the complainant, having left his house in 1840, and before said Maria had finally withdrawn as aforesaid, they were repeatedly importuned by the complainant to return, especially that this defendant Margaret might superintend the household matters of the complainant; on which occasion the complainant charged his said wife with negligence, waste, and even theft, and declared that he, the complainant, would be ruined in consequence. That from sympathy with the deplorable situation of the complainant with reference to his personal and family affairs, they consented and returned and resumed the charge of the complainant's family. Then it was, as the defendant Freeman alleges, that the complainant having sent for this defendant, the complainant being quite sober, as of himself, and speaking his own uninfluenced sentiments, declared his apprehension that his said wife, absent, and clothed by law with authority to contract debts on his account, would ruin him; to avert which he, the complainant, proposed to convey his property to his daughter, and cause a judgment to be entered against him in favor of this defendant. And he, this defendant, utterly denies, again, that he directly or indirectly persuaded or

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urged, in any way induced or influenced the complainant so to convey his property or confess said judgment.

He denies that he stated to said complainant that his said wife had run him in debt or would run him in debt, and that all his personal property would go to satisfy the debts by her contracted. On the contrary, he charges that the complainant himself made such statements, and added that she had stolen his money, and that he had not money even to pay his harvest hands, but had been obliged to borrow it.

These defendants deny that on the 2d of September, 1842, at or before the execution of the deed of that date, the complainant was in a state of gross intoxication. On the contrary, they aver that, although not perfectly sober, he well knew what he was about doing, and the nature of the transaction, and freely, intelligently, and voluntarily executed said deed, and entirely uninfluenced by these defendants or either of them in the way charged in the bill, or in any way, and that, in like manner, the execution of the promissory note was well understood by the complainant, as were the other papers connected with said judgment for \$1655, that the same were the complainant's measures, suggested by him, and not by these defendants; and, as these defendants believe and charge, perfectly understood by him. That, as to the consideration of the judgment, they submit that the said consideration was a fair, just, and legal one. That these defendants, after their marriage, for eight years lived with complainant under an assurance that he would do better for the defendant than he could do for himself elsewhere, and during that period devoted their time and services, to a very considerable extent, to the supervision and management of the family and business of the complainant, and during the whole period, received from him \$80, the price of a horse given by the complainant to the defendant, and \$3.50, more than which last sum was expended by the defendant for tobacco for the complainant, at his request. That, during the said period, a very unusual amount of anxious, patient and enduring care, attention and forbearance was exacted by the situation and habits of the complainant; and that a very moderate estimate of their services for such period would, at least, amount to the consideration of the said judg-

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ment. These defendants, therefore, feel authorized to deny, that when said judgment was confessed, the complainant was not justly and truly indebted to this defendant.

The defendants deny that the person who drew said deed, after it was executed advised the complainant not to deliver it, but to wait a few days, during which he would take and keep it, and if, upon reflection, the complainant should order it to be delivered, he would do so, but not till then.

They charge that said deed was fully delivered, and the said scrivener expressly authorized by the complainant to take it and have it recorded; that said scrivener voluntarily made the suggestion that he would retain it for a few days, that if complainant should change his mind, he might recall the deed; that such suggestion, if assented to, was scarcely adopted by the complainant, and that, for all that occurred, the scrivener was still at liberty to have the said deed and accompanying mortgage recorded forthwith, had he desired to do so.

These defendants, and especially Freeman, deny, that while said deed was in the hands of the scrivener, he induced a delivery thereof, or influenced the mind of the complainant against his said wife, or to deprive her of support. This defendant pronounces the whole statement utterly untrue, if not preposterous, under the circumstances of the case, as hereinbefore stated; and, in like manner, he denies that he obtained possession of the complainant's account book, or placed within it the note referred to in the bill. On the contrary, he charges that any such memorandum or note, if written by him, of which he has no distinct recollection, was written at the request and under the dictation of the complainant himself—placed within said book by himself, and for his own purposes, with which this defendant felt so little interest that, with the aid of the best reflection he can bestow on the point, he has not been able more distinctly to recall the occurrence. With respect, nevertheless, to the purport or substance of said memorandum, unlike the complainant, these defendants entertain no doubt that such purport and substance were entirely true. This defendant denies that he wrote said note, on the supposition that he wrote it at all, for the purpose of getting, fraudulently, the possession of said deed.

These defendants deny that he (Freeman), while complainant was in a state of intoxication, prepared and addressed the order mentioned in the bill, or that the same is forged, or the signature thereto, or by the complainant unintelligently executed; but they affirm that said order was written early in the morning, under the dictation of the complainant, and at his request, and without the slightest influence exerted of these defendants, or either of them, and was deliberately signed by the complainant after it had been read by him and in the presence of the defendant Margaret.

They deny that the complainant, when he executed said deed, note, and warrant of attorney, had not power of mind to comprehend the contents thereof, but allege that they were fairly, intelligently, and in good faith executed, without the intervention of these defendants, their influence, or the exercise of any compulsion, concealment, or fraud, and were just, proper, and necessary acts in themselves, were designed by the complainant, and, in effect, have subserved the true interests of the complainant hitherto.

They admit that, at the complainant's request, they, shortly after the execution of said deed, removed to the house and farm in said deed mentioned, and have received the issues and profits thereof, and faithfully and liberally applied a large share thereof to the support and maintenance of the complainant and his said wife, actually advancing towards the expense of said wife, during the first year after the date of said deed, upwards of \$150, and applied, of the residue, from time to time, not less than \$500 towards the liquidation of the debts of the complainant, by him contracted before the execution of said deed, to which same object the complainant applied \$250, by the assignment of several notes by him previously taken, and, to the time of such application, held and owned by him.

They admit the judgment and execution, and, after two years thereafter, a sale of the personal property of the complainant, and the purchase thereof by Freeman, and held and owned by him ever after, and that such sale was made necessary and proper by the following circumstances: that, after their removal to the homestead farm, the complainant, under agencies which

they willingly forbear to specify, desired to bring his said wife back, from which he was deterred a considerable time by the declaration of these defendants that if he should persist in doing so they would leave him. Yet he, notwithstanding, brought her back. That her conduct became so intolerable that the complainant, by the advice and influence of a friend principally, was induced to send her away again, but in doing so authorized her to incur debts on his account. That his said wife and also the complainant did, from time to time, incur such debts, to such extent that the whole net profits of said two farms were absorbed by the payment thereof, with such payments as were before mentioned, by upwards of \$200; and the complainant was subjected to suits on account thereof, before justices of the peace, and judgments rendered against him, in consequence of all which the preservation of the just rights of this defendant made such sale necessary; at which sale he became the principal purchaser for such prices as the property would bring, as he supposed was his right and duty to do; and that the property has since remained in his possession, subject to ordinary wear and transfer for the benefit of the family, and in a good degree for the benefit of the complainant himself.

He denies that at the time of filing the bill he was engaged in cutting down large quantities of wood for sale, for rails or other purposes; or that he ever declared it was his intention to cut the whole or nearly the whole of the timber standing on said farm, so far excepted only as was necessary to pay the costs and expenses of the litigation in which he was involved by the complainant.

In like manner, he denies that he has carted from said premises large quantities of soil, manure or compost, or more than a just proportion of either.

He says that though the wood and trees on said farm, unless felled, will deteriorate, yet he has neither cut, nor authorized to be cut, any timber during the spring of the present year, other than for ordinary use for fuel, except from 150 to 200 rails, to be used on the back farm, and 4 or 5 cords of fire-wood. That during the last winter, 4 or 5 cords of wood were sold or exchanged for coal, and a shoemaker's bill of \$8 or \$10 paid by so.

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much wood ; and none cut or disposed of beyond these items ; and that, in truth, by far the greatest part of the wood cut from said premises was cut during the winter of 1842-3, to pay the debts of the complainant, and at his request.

They deny that the complainant ever applied for or requested a re-conveyance of said farm ; and in their judgments, it would be devoted to the purposes of vice and intemperance, to the great grief of the complainant's relatives and friends, in all probability, should the complainant become re-invested with said property.

On this answer, a motion was made to dissolve the injunction.

Leupp, in support of the motion. He cited 1 *Halst. Ch. Rep.* 21, 81 ; *Saxt.* 476 ; 1 *Green's Ch.* 193 ; 3 *Ib.* 446.

W. Thompson, contra.

THE CHANCELLOR. The injunction will be retained until the hearing of the cause.

Motion denied.

SAME CASE, 4 *Hal. Ch.* 814 ; 1 *Stockt.* 916.

DANIEL BRAY v. MARY ANN BRAY.

Insufficient evidence of adultery on bill for divorce.

Bill for divorce. The bill charges that the defendant, since her marriage with the complainant, and in the month of November, 1845, committed adultery, in the house of the complainant, and in his absence, with one ——— ; that about two weeks after the commission of the said offence, she voluntarily deserted the house and protection of the complainant ; and the complainant says that he believes, and therefore charges, that the de-

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defendant has been guilty of improper conduct, and has committed adultery with one or more person or persons in this state, whose names are unknown to the complainant.

The defendant answered the bill. She admits the marriage as stated in the bill, and says she continued to live in the same house with the complainant till the latter part of the fall or the fore part of the winter, 1845, when she left his house on account of his cruelty towards her, and by his express orders. She says she lived with the complainant as his wife till July, 1845, when the complainant ceased all intercourse with her as his wife, and kept increasing in his unkindness and cruelty towards her, until he forced her from his residence as aforesaid. That the complainant treated her kindly for some months after their marriage, until he inherited a farm worth about \$15,000 or \$20,000, when his treatment of her began to change, and kept growing worse until their separation as aforesaid; and that at their marriage they were both poor. That the complainant, from July, 1845, until the said separation, refused to converse with her, and refused to permit her to have any management or control in his house, and gave the whole control and management of the family to his mother, and insisted upon this defendant's communicating with him only in writing, and wrote her several notes, two of which only are preserved, a copy of the first of which is as follows: "Dear wife—I have no objection to talk with you, but I don't think it prudent to be alone with you, because you have acted very bad, bad enough for me to never countenance you again; and as I have said I would forgive you of what you have done, provided you look to your Maker, and make a great alteration for the better, I will be with you as I was before, and be intimate, but not till then. If you wish to talk with me, do it before people, it is better for you, and will suit me better; if you don't want to say anything before anybody, you can write, but it is better for you to talk with me before mother, if no one else." Which note this defendant received in August, 1845. The second note she received a short time afterwards, and is as follows: "Dear friend—I inform you I found a special note in my vest pocket, and it specified that you felt better, and I would like to know how it is that you feel better, when there is all appearance

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of the same disposition that you formerly had. I am under the impression that you are trying to make a cloak to win my affections back again, and then you would be the same again as ever. But I'll have you to know that I am not a fool, not quite. I can see you when you don't think I am anywhere about, and more than that, I think you are very deceitful, but don't look for my affection again; that trap is triped, but never again shall it be triped the next yourself is triped."

The defendant further states that, after she received the last note, she received several others from her said husband, before she left as aforesaid, containing the most unkind expressions, one of which contained the expression that he never again meant to use this defendant as his wife, which said last mentioned notes she says she has lost.

She further says that from the time she went to live with her said husband, his mother had the control of the family, and from July, 1845, till the separation aforesaid, the mother of the complainant forbid and prevented the defendant from eating at the same table with her said husband; obliged this defendant to wait for her meals until after the family were done, when this defendant got her meals, the best way she could, of the fragments which were left, and that this treatment continued until the week before she left as aforesaid.

She further states that, for the last week before she left, her said husband and his said mother refused to let her have anything to eat, and all she got to eat, for the last week, was from her neighbors, who furnished it to her as a matter of charity; and that then, there appearing to be no prospect of any end to this cruelty, and her said husband telling her that she must either leave his house, or he would make her leave it, she left his house, and went to her uncle's, Jonathan Pearce, and has ever since resided separate from her said husband. And she denies that she left the residence of her said husband except for the causes and under the circumstances before stated in the answer.

She expressly denies that in November, 1845, or at any other time or times, she committed adultery in the house of her said husband, or in any other place, with one —, or with any other person or persons whatsoever. And she further denies that

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she, at any time, voluntarily deserted the house and protection of her said husband, and except as in her answer is set forth.

She further denies that she has been guilty of improper conduct, or has committed adultery with any person or persons whatever, in this state or elsewhere; and avers that the charges of adultery made in the complainant's bill against her are wholly untrue.

She states that the complainant, frequently, before she left his residence as aforesaid, told her to leave his house, but that she continued to bear his unkindness as long as she could; and she avers that she always, since her marriage with the complainant, faithfully regarded towards him her marriage vows, and was true and faithful to his bed as his lawful wife.

She states that her said husband is now a man of large property, worth some \$15,000 or \$17,000; and that her solicitor was preparing a bill for alimony when the subpoena in this cause was served upon her.

The testimony on which a divorce is asked sufficiently appears in the opinion delivered by the court.

P. D. Vroom, for the complainant.

P. Vredenburg, for the defendant.

THE CHANCELLOR. It appears by the testimony, more particularly by that of Aaron Armstrong, that some months before the alleged act of adultery charged in the bill, the complainant had left his wife's bed, or had driven her from his, and had declared that he would not live with his wife. She occupied a different bedroom from that in which he slept. He had taken other measures which showed his determination to get rid of her. This state of things has its influence in examining the proof of the alleged act of adultery, and in considering what weight it is entitled to. The testimony shows that the wife was fully apprised of the complainant's desire to get rid of her, and that she was desirous that the difficulties between them should be accommodated, and desirous to remain with him as his wife.

The testimony as to the act of adultery is certainly of a very extraordinary character, not to say marvelous. The facts from

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which we are asked to infer adultery are sworn to by a single witness only.

This witness says she stayed all night at the complainant's house; that she went to the door of the room in which the wife slept that night—the night on which the adultery is alleged to have been committed—at about midnight; that it was a moonlight night; that the door was open so that she could see the bed, and that she saw the person with whom the adultery is alleged to have been committed in bed with the wife; that the husband had gone to New York the day before, and did not return until the next day—*i. e.*, the day succeeding the night on which the adultery is alleged to have been committed. How the witness knows when the husband did return we are not told. She says that when she went to bed she left the person with whom the adultery is said to have been committed, down stairs in the sitting-room. That after she went to bed she heard him come up stairs. How she knew it was he who came up stairs, we are not told.

The testimony has failed to impress my mind with a belief that on that night, and under the circumstances in which the wife then stood, any adulterous intercourse with her took place. It is much more credible, to my mind, that certain arrangements had been previously made for the purpose of getting up evidence of adultery in the wife. And it is very easy to perceive how this might have been done, and this witness herself imposed upon.

I do not feel justified in decreeing a divorce for adultery on such proof.

Divorce denied.

THE EXECUTORS OF JACOB H. VOORHEES, DECEASED, v. THE
EXECUTORS OF JOSEPH VOORHEES, DECEASED, AND
OTHERS.

A devise and bequest were made to "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America." Such a society, for the spread of the gospel, was organized and known by the above-stated name, at the date of the will, had its place of business in the city of New York, and its officers and board of directors; and it was incorporated, under the above-stated name, before the death of the testator. *Held* good.

On the 23d of September, 1846, the executors of the will of Jacob H. Voorhees, deceased, exhibited their bill, stating that Joseph Voorhees, deceased, late of Monmouth county, died on the 14th of September, 1845, leaving a will, dated November 15th, 1838, by which he ordered his executors to sell all his estate, real and personal, as soon after his death as they might think proper; and directed them to disburse the money arising from the sale, and all other moneys that might belong to his estate, after paying debts, &c., as follows: giving \$100 to the Episcopal fund of the diocese of New Jersey; \$100 to the Sunday school that is or may be attached to Christ Church, Shrewsbury, to be funded, or appropriated to the best advantage for the said school, under the direction of the rector of the said church; \$500 to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America; and giving to his two children, Jacob H. Voorhees and Hannah Voorhees, all his remaining estate, as follows: One-half to the said Jacob H., as follows: The money to be put at interest, or invested in real estate, and the proceeds or interest to be paid to the said Jacob H. during his life, and after his death the principal to go to his issue; and if he die leaving no children, or such children should die before they become twenty-one years of age, then the said estate to go to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America; and the other half of his remaining estate, as afore-

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said, to his daughter Hannah, as follows : (in the same way as to Jacob,) and on her death without leaving children, or if such children die before they become twenty-one, the said estate to go to the Domestic and Foreign Missicnary Society of the Protestant Episcopal Church in the United States of America ; and appointing Francis Smith and Nathaniel B. Holmes, both of the State of New York, executors of his will. The executors proved the will.

That the said Joseph Voorhees left but two children, viz., the said Jacob H. Voorhees and the said Hannah.

That the said Hannah has since married Thomas Morford, Jr.

That the said Jacob H. Voorhees died on the 8th of July, 1846, without issue, leaving the complainant Tabitha Voorhees his widow, and leaving a will by which he gave and devised all his estate to his said widow, and appointing the complainants executors of his will, and that they proved the same, and took upon themselves the burden, &c.

That the real estate of the said Joseph Voorhees, deceased, consisted of his homestead farm in Shrewsbury, Monmouth county, containing about 290 acres, and outlands situated principally in said county, containing 700 acres or more ; and that the executors of the will of Joseph Voorhees have sold most of his real estate, and threaten to sell the balance.

The complainants say they are informed and believe that there is no such incorporation or society known by the name of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America ; or that if there is such an incorporation or society, it is not empowered to take the said legacies or devises ; and they submit that the said legacies and devises are of no legal validity, and should be declared void, and that the same may be paid over to the complainants, as executors of the will of said Jacob H. Voorhees, and to the said Hannah Morford.

That the real and personal estate of the said Joseph Voorhees, deceased, is worth from \$15,000 to \$18,000, according to the best of the complainants' information and belief ; and that the whole of it is now in the hands or under the control of the said executors of the will of said Joseph Voorhees, deceased ; and

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that the said executors are residents of the State of New York.

The bill prays that the said legacies and devises to the pretended The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, may be declared to be void, and that the executors of the will of said Joseph Voorhees be decreed to pay over the same to the complainants and the said Hannah Morford; and that they may come to an account with the complainants of the estate of the said Joseph Voorhees, deceased, in their hands, &c.

The executors of the will of Joseph Voorhees, deceased, to so much of the bill as relates to the devises and bequests in said will to and for the use of the society called therein "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America," pleaded that the said estate, real and personal, devised and bequeathed by the said will was devised and bequeathed to them, as executors of the said will, in trust for public and charitable purposes, and that they, as such executors, were competent to take and execute such trust; that at the date of the said will, as well as at the death of said testator, there was an organized society referred to in said will, known by the name and description of "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America," and having its place of business in the city of New York, constituted for a certain specific, charitable, and public purpose, to wit, the spread and propagation of the gospel through domestic and foreign parts; which society, at the time of and long before the decease of the testator, had its officers and board of directors regularly appointed, to wit, at the city of New York; that the said society and its objects were well known to the testator, and had been long engaged in such objects, and annually received, by donations, public and private, large sums of money, which were appropriated, through its agents, to such public and charitable purposes as are before referred to; that the said society was competent in law to take such charities directly by devise or bequest, as well as to receive the benefit of such devises and bequests through the execution of a power or trust created by will or otherwise; that on the 13th of May, 1846, and before the

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death of Jacob H. Voorhees, the complainants' testator, the said society was duly incorporated, under the name and description aforesaid, by an act of the legislature of the State of New York, and which said incorporation is competent in law to take by bequest and devise as aforesaid.

This plea was demurred to.

P. Vredenburg, in support of the demurrer, cited 4 *Wheat.* 27; 3 *Peters* 111.

W. L. Dayton, *contra*, cited 9 *Cranch* 292; 20 *Wend.* 117; 3 *Edw.* 79; 7 *Verm't Rep.* 241; 1 *Hoff. Ch. Rep.* 202; 6 *Hill* 407; *the case of Sarah Zane's will*, decided by Judge Baldwin, cited from a pamphlet; *the case of Gerard's will*, 7 *John. Ch.* 292.

THE CHANCELLOR. The devise and bequest are to "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America." Such a society for the spread of the gospel was organized, and known by the above-stated name, at the date of the will, had its place of business in the city of New York, and its officers and board of directors, and was incorporated, under the above-stated name, before the death of the testator.

The question of the validity of bequests of this nature has been so fully discussed, and so elaborately examined, in the recent cases in this country, cited at the bar, that it is unnecessary for me to attempt an examination of the subject at large. The validity of such bequests can hardly be considered an open question in this country, at this day.

Demurrer overruled.

SARAH SMITH v. JOHN SMITH.

A voluntary conveyance by a man, on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the interest which she would acquire in his estate by the marriage, is fraudulent as against her.

On the 21st of October, 1845, Sarah Smith, of Trenton, widow of Owen Smith, deceased, exhibited her bill, stating that her said late husband, previous to his marriage with her, was seized of three houses and lots in Trenton, and one other tract of land, of about fifty-six acres, in the township of Hamilton, in the county of Mercer. That, previous to her said marriage, she had a good situation as housekeeper, in the family of Mr. Charles Green, and was earning at the rate of \$1.25 a week. That she had previously worked for the said Owen Smith, and he was indebted to her, for wages, \$98.50, to secure the payment of which, he gave her his promissory note, dated April 16th, 1844, by which he promised to pay her, by the name of Sarah Olden—that being her name previous to the said marriage—or order, one year after date, \$98.50, without defalcation or discount, for value received. That while the said Owen was addressing her, and shortly previous to her consenting to marry him, and as an inducement for her to do so, he told her that he had several houses and lots in Trenton, and a tract of fifty-six acres in said township of Hamilton, and that if she would marry him, she should always have a good home, and that he would not make any of his said property out of his hands, and, also, that he would pay her the amount of the said note, notwithstanding the marriage; and, after the marriage, he frequently told her that he never considered the said note as belonging to him, but as her own property, and that he would pay it.

That, placing implicit confidence in the promises and assurances made to her by the said Owen previous to the marriage, and also knowing that he was possessed of several houses and lots of land, and that he owned a store in Trenton, and was doing a

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good business, and possessed considerable personal property, she consented to marry him, though, at the time, his health was infirm, and he was about sixty years of age, and older than the complainant by twenty years.

That she was married to the said Owen on the 31st of July, 1844, in Trenton, at two o'clock in the afternoon, and that, at the time of her said marriage, she had no knowledge, intimation, or suspicion that he had assigned, transferred, or in any way disposed of any of his real estate, and if she had been apprised of any such transfer, she would have declined and refused to marry him, inasmuch as such transfer was in direct violation of the promise of the said Owen to her, and in fraud of her marital rights.

That some months after the marriage, she learned, for the first time, that the said Owen had, on the day of the marriage, conveyed away all his real estate.

That, on the day of the marriage, the said Owen conveyed a lot on the northwest side of Willow street, in Trenton, containing three hundred and eighty feet, and a lot in the township of Hamilton, county of Mercer, containing fifty-six acres, to John Smith and Joseph G. Brearley, for the consideration of \$1, in trust for the use of the said Owen Smith for his life, and then, in trust, to receive the rents and profits, and pay them to his daughter, Mary Smith, during her life, and, after her death, for his three sons, John Smith, Bernard Smith, and Peter Smith.

That the said conveyance was made without her knowledge or consent, only two or three hours before the marriage, and was done with the intention of depriving her of her dower in the said lands, in case she should survive her said husband, and that it was a fraud upon her marital rights. That it was done in a clandestine manner, and that the name of Joseph G. Brearley, a respectable citizen of Trenton, was inserted in the said deed of trust without his knowledge or consent, and for the purpose of giving a color of fairness to the transaction, and to deter her from contesting the validity of the transaction, or for some other sinister object, and that the said Brearley never accepted the said trust, nor acted under it, and knew nothing of his name having been inserted in the deed of trust, until the 9th of August,

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1845, when he was informed of the fact by the agent of the complainant.

That soon after the death of the said Owen, the said John Smith, Bernard Smith, Mary Smith and Peter Smith, under and by virtue of the said fraudulent deed of trust, entered into possession of the said freehold estates of the said Owen, and took possession of all the title deeds, evidences and writings relative thereto.

That the house in Chauncey street, Trenton, and the lot of land on which the same is, remained in possession of the said Owen at the time of his death ; and that the house is occupied by Charles James and others, and rents for \$70.

That she has applied to the said heirs-at-law to account for and pay to her one-third of the rents and profits of the said freehold estates since the death of the said Owen Smith, and to assign to her one-third of such freehold estates.

That she has applied to John Smith, administrator, &c., of said Owen Smith, and that he has refused to pay her the amount of the said note.

That she has, also, applied to the said heirs-at-law to assign to her dower in the said lots of land conveyed to the said John Smith and Joseph G. Brearley in trust as aforesaid, and to cancel and destroy the said deed of trust.

The bill prays, among other things, that the defendants may answer whether the said John Smith and Joseph G. Brearley, or either of them, took possession of the premises described in the deed of trust, or of the said deed, and whether they paid the taxes thereon, or received the rents thereof, in the lifetime of the said Owen Smith ; and that the defendants may discover and set forth a full and true description of such freehold premises ; and that an account may be taken of the rents and profits of the said freehold estates since the death of the said Owen Smith ; and that one-third part thereof, arising not only from the lands described in said deed from the said Owen Smith to John Smith and Joseph G. Brearley, but also from the said house and lot in Chauncey street, and the lot of land on Willow street, may be paid to her ; and that one-third of such freehold estate may be assigned to her for her dower, and she be let into the immediate

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possession and enjoyment thereof, and be decreed to hold the same for her life; and that the said John Smith, Mary Smith, Bernard Smith and Peter Smith may be decreed to produce all title deeds, evidences and writings relative to said freehold estates.

On the 31st of March, 1846, a decree *pro confesso* was taken against the defendants, and an order made that the complainant produce documents and witnesses to substantiate and prove the allegations in the bill.

On the 20th of June, 1846, John Smith put in his several answer.

He admits that Owen Smith, before the marriage, was seized of the lands mentioned in the bill. He says he has no knowledge of the situation, employment or earnings of the complainant immediately before the marriage, but he admits that some time previous to the marriage she was in the employ of said Owen Smith and in his family, as a domestic. He admits that said Owen, before the marriage, gave her the note mentioned in the bill, as he believes, and says that the consideration of the said note may have been as set forth in the bill, but that he has no knowledge thereof, and can neither admit nor deny the same.

He says he has no knowledge whatever of the misrepresentations alleged in the bill to have been made by said Owen to the complainant respecting the said note, nor of the inducements alleged to have been held out by him to induce the complainant to marry him, and that he cannot answer as to his belief, or otherwise, touching the same, excepting that, from his knowledge of the complainant, and of her situation previous to the marriage, he believes that no very strong inducements were required to induce her to marry the said Owen Smith.

He admits that the said Owen, previous to the marriage, was possessed of considerable real estate, and owned a store, and possessed considerable personal property, and was doing a good business, in a small way; and that it may be true, as stated in the bill, that knowing these circumstances, and thereby mainly induced thereto, she consented to marry the said Owen.

He admits the marriage as stated in the bill, but whether at the time of the marriage she had any knowledge or suspicion of

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the conveyance of a part of his real estate previously made by the said Owen he does not know, and cannot answer as to his belief or otherwise.

He admits that the said Owen, by deed dated July 30th, 1844, conveyed a part of his real estate, that is to say, his house and lot on Willow street, and the farm of 56 acres, to him and Joseph G. Brearley, upon the trusts in the bill set forth.

He says the said deed was duly acknowledged on the 31st of the same July, before a master in chancery, and on the 1st of August, in the said year, was recorded in the clerk's office of Mercer county.

He says he believes the said deed was executed very shortly before the marriage, but whether on the same day or the day previous, he does not know, as he was not present at the making thereof; nor does he know whether the complainant or Joseph G. Brearley, one of the grantees named therein, was informed of the making thereof; nor whether the said Brearley accepted the said trust; but he respectfully insists that the ignorance of the trustee, or his refusal to accept the trust, cannot invalidate the trust, if the conveyance is otherwise lawful and proper.

He says he has no knowledge of any fraudulent intent or purpose whatever on the part of the said Owen in the execution of the said deed; nor had he, this defendant, any fraudulent intent or purpose whatever in accepting the same.

He says that a day or two previous to the marriage, the said Owen informed him that he was soon to be married, and that previous to his marriage, he was desirous of making some provision for his children, and especially for his daughter Mary, who then was and now is of very weak and imbecile mind, utterly incapable of attending to business, or of maintaining or providing for herself, and asked this defendant if he would consent to act as trustee for his said daughter, Mary; to which this defendant consented. That the said deed was, after its execution, delivered to this defendant, and by him left at the clerk's office to be recorded.

He says that so far as he knows, and as he verily believes, the said deed was not made by the said Owen for the purpose of de-

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frauding the complainant, or with any fraudulent intent or purpose whatever, but solely with the view of making a fair provision, out of his estate, for his children by a former marriage, and especially for his unfortunate daughter, in whose welfare he was deeply interested; and this defendant denies that any fraud was meditated or designed by him in accepting the said conveyance.

He insists that inasmuch as the said conveyance was in favor of the children of the said Owen by a former marriage, as it included only a part of his estate, the said Owen still remaining seized and possessed of a considerable personal and real estate, and far more than is usually possessed by persons in the station of life of the complainant previous to her marriage, there is no just reason for impeaching the said deed as a fraud upon the marital rights of the complainant; and he insists that the said deed is legal, valid and binding; and that the said Owen had full power and just right, at law and in equity, to execute the same; and that the complainant has no right or title to dower in the premises conveyed by the said deed.

He says the said Owen died on or about March 5th, 1845; and that on his death this defendant, by virtue of the said deed, entered into the possession of the premises conveyed thereby; and that he still holds the same by himself or his tenants, and applies the rents and profits thereof to the support and maintenance of the said Mary Smith, the *cestui que trust* in the said deed named; and that he is also in the possession of the deeds and muniments of title to the said premises.

He denies that the other heirs-at-law of the said Owen have entered into the possession of the said lands, or possessed themselves of the title papers relative thereto, except that the said Bernard Smith occupies the said farm as a tenant of this defendant, paying rent therefor.

He admits that the children and heirs-at-law of the said Owen, the defendants in this cause, on the death of their father, became seized of the real estate whereof he died seized, being the said house and lot on Chauncey street, and have taken possession thereof and of the deeds and muniments of title relative thereto.

He admits that the said house in Chauncey street rents for the

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sum mentioned in the bill; that, as administrator of the said Owen, his father, he has refused to pay to the complainant the amount of the note so given to her; he having been advised and believing that the said note was extinguished by the marriage, and that he could not, as administrator, pay the same without subjecting himself to personal liability therefor.

He denies that he has attempted to deprive the complainant of her dower, to which, in consequence of her marriage with the said Owen Smith, she became justly entitled.

The cause was brought to hearing on the pleadings and evidence.

W. Halsted, for the complainant. He cited *Wash. C. C. Rep.* 224; 5 *John. Ch.* 489; 2 *Dana* 14; 2 *Leigh* 30; 3 *John. Ch.* 517; 2 *Vern.* 17; 2 *P. Wms.* 674; 2 *Bro. Ch.* 345; 6 *Cowen* 67; 18 *John. Rep.* 426; 1 *Roper on Husband and Wife* 356; 1 *Story's Eq. Jur.*, § 629; *Eq. Draftsman* 650; *Seaton's Forms* 184, 5; 2 *Ch. Rep.* 70, 81; *Gilb. Lex. Pretor.* 267.

P. D. Vroom, for the defendants. He cited *Reeve's Dom. Relations* 86, ch. 7; 2 *Roper's Husb. and Wife* 76; 1 *Ib.* 163, 204; 2 *Kent's Com.* 135, § 28; *Jeremy's Eq. Jur.* 401; 1 *Vern.* 408; 2 *P. Wms.* 357; 1 *Coxe* 33; 1 *Ves., Jr.*, 28; 1 *Russel C. R.* 485; 2 *Ch. Rep.* 42; 2 *Freeman* 29; 2 *P. Wms.* 535; 1 *Atk.* 265; *Cowper* 705; 1 *Atk.* 158; 2 *Ves.* 264; 1 *Fonbl. Eq.* 268; 2 *Story's Eq.* 271.

THE CHANCELLOR. On the day of the marriage between the complainant and her late husband, and just before the marriage, he, without the knowledge of the intended wife, for the consideration of one dollar, conveyed certain real estate to trustees, in trust for his own use during his life, and after his death, in trust to receive the rents and pay them to his daughter Mary, a daughter by a former wife, during her life, and after her death in trust for his three sons.

I cannot doubt, on the evidence in the case, that the object of the conveyance was to defeat the complainant of the right she

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would acquire in his estate by the marriage. The other ground or reason now set up for the making of the conveyance, namely, the providing for his imbecile daughter after his death, was not, it appears to me, the real motive.

I am of opinion that a voluntary conveyance by a man, on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the interest which she would acquire in his estate by the marriage, is fraudulent as against her. I see no sound distinction between this case and the like conveyance by a woman under like circumstances.

Decree for complainant.

LEWIS E. DAVENPORT AND CORNELIUS CRAWFORD, JR.,
ADMINISTRATORS, &c., OF CALVIN COOK, DECEASED, v.
HENRY COLE AND OTHERS.

An improvident agreement, made for a consideration grossly inadequate, by one of great imbecility of mind, with another whose position in relation to him conferred undue influence and control over him, will be set aside.

The bill in this case was filed on the 27th of June, 1845, by the administrators, &c., of Calvin Cook, late of Bergen county. It states that Cook died intestate, on the 20th of May, 1845, owning and being entitled to considerable personal estate. That, on the 19th of June, 1845, administration of his personal estate was granted to the complainants. That the complainants have been informed and believe that Cook, in his lifetime, was indebted to the estate of John Robinson, late of the city of New York, in a sum exceeding \$2000. That the said Robinson died intestate, in 1822, in New York; and that said Cook, with Elizabeth Robinson, widow of said John Robinson, and sister of said Cook, administered on the estate of said J. Robinson, deceased, in New York; and that Cook became possessed of the personal

estate of said Robinson to an amount exceeding \$2000, which remained in his hands unaccounted for until his death. That on the 25th of February, 1834, an order was made by the surrogate of New York, requiring the said Cook and Elizabeth Robinson to account, which they neglected to do, and a further order was thereupon made that the administrators' bond given by them should be prosecuted. That Cook, having information of the last order, thereupon left New York, and returned to New Jersey, where he resided, and continued to reside, until his death.

That the complainants are advised by their counsel, and believe and insist that, by means of the proceedings aforesaid, the said administration bond was forfeited, and that the same is now due, and is, and has been from the said year 1834 until the death of said Cook, a subsisting demand against him, and now constitutes a legal demand against his estate.

That the complainants are informed, believe, and charge that said Cook was a man of large property, having personal estate to a great amount; that the same was variously estimated, by persons acquainted with his estate and circumstances, at from \$10,000 to \$50,000. That the complainants believe and charge that it was of the value of \$15,000 and upwards. That he was never married, and left no near kin, except two nieces, children of the said Elizabeth Robinson, who are his only heirs-at-law, the oldest of which, Susan H., is now the wife of the complainant Lewis E. Davenport, and the youngest of which, Sarah E., is now the wife of the complainant Cornelius Crawford, Jr.

That for several years before August, 1841, Cook was subject to occasional despondency of temperament, and exhibited occasional mental aberrations, and was deranged in his intellect.

That about that time, and before the 1st of November, 1841, his mind became entirely enfeebled, and he was deprived of his reason and understanding, so as to be incapable of governing and taking care of himself, and wholly incompetent to manage his pecuniary affairs.

That said Cook was very penurious and miserly in his habits, and scarcely allowed himself the ordinary comforts of life, either in clothing or provisions. That for some time previous to the 1st of August, 1841, he was in the habit of wandering about the

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country, stopping at houses, the occupants of which were strangers to him, and soliciting them to take him in. That he sometimes slept in barns. That some time in August, 1841, the said Cook, by some means unknown to the complainants, found his way to the house of Henry Cole, the defendant, then and now residing in Saddle River township, in the county of Bergen, in whose possession the said Cook was afterwards found. That Cook and the said Cole, and the family of said Cole, had never, before that time, been at all acquainted, but were entire strangers to each other. That Cole, for some reason, then took Cook into his house, and Cook continued to reside with said Cole and his family until he (Cook) died. That after Cook came to the house of Cole, as aforesaid, he was usually kept in the house, or, if he went out, did not, at any time, go beyond the yard or enclosure of said Cole, and, having no near relations in the country, except the wife of the complainant Crawford, and she living in the State of New York, very few persons called to see him, and very little was known of his situation.

That said Crawford's wife, having learned that her uncle—the said Cook—was at the house of said Cole, went there to see him, and was informed by said Cole, or his family, that he did not go out of the room in which he was kept, and that the family did not wish him to see any of his friends or acquaintances, for he acted so bad that they could not control him; and she was permitted to have but a momentary interview with him. That in this interview he did not, apparently, recognize her, although he had, before, known her most intimately.

That the said Sarah E. Crawford, at that time, proposed to take said Cook to live with her, and offered to do so, but Cole declined to allow it, saying that he had undertaken or agreed to take care of him during his life, or words to that effect.

That when Cook came to the house and possession of Cole, as aforesaid, there were large sums of money due him from various persons in New York and New Jersey. That, among others, there was due to him from the commercial house and firm of Richard S. Williams & Co., of the city of New York, a sum exceeding \$8000; from Walter Kirkpatrick, of New Jersey, exceeding, with interest, \$2000, for which Cook held the note

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or notes of said Kirkpatrick. That there was then also due to Cook from Andrew B. Cobb, of Morris county, New Jersey, \$1000 and upwards, for which Cook held said Cobb's note or bond, or the note or bond of said Cobb with some other person or persons joint promissors or co-obligors with him. And that the complainants have reason to believe, and do believe, that other debts of considerable amount were then due and owing to Cook, for which he was then in possession of securities or evidences of indebtedness, but that the complainants, for want of evidence, are not now able to specify the same.

That when Cook found his way to the house, and came under the control of Cole, as aforesaid, besides the securities for money and evidences of indebtedness aforesaid, he had in his possession a considerable sum of money, more than \$150, and, as complainants believe, \$300.

The complainants charge, that on or before the time when Cook came to Cole's, as aforesaid, Cole ascertained that Cook possessed abundant means to pay for the expenses of his maintenance; and that, at that time, or shortly afterwards, he discovered that Cook not only possessed such means, but also that he was a man of large estate in money, and securities for money, and, considering the state of imbecility and derangement of mind under which Cook was evidently laboring, conceived the design of fraudulently dispossessing him of his property and appropriating it to his own use; that in pursuance of such fraudulent design, Cole, a short time after he got possession and control of the person of Cook, as aforesaid, went to the said Richard S. Williams & Co., and having, or pretending to have, some assignment or authority to collect said debt due from them to Cook, and being in possession of their said note for the same, the more effectually to carry out his said design, induced the said Williams & Co. to change the security for the said defendant, and actually gave up to them the said note, and received for the amount of principal and interest due on it, and for other money, a bond and mortgage made to the said Cole, in his own name, and for his own benefit; and the complainants are informed that the said bond and mortgage are for the sum of \$11,000; and they believe and charge that the same were given for the amount

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due on the said note of Williams & Co., and for other moneys which Cole had received belonging to said Cook, or which was due from said Williams & Co. to said Cook.

That Cole, further in pursuance and execution of his said fraudulent design, after he got possession and control of the person of Cook, but at what particular time the complainants are ignorant, having, by some means unknown to the complainants, got possession of said note or bond given by said Cobb to said Cook, and pretending to be the owner thereof by an assignment of the same, or to have authority from Cook to collect or settle the same, induced Cobb to take up the same, and, in lieu thereof, to execute and deliver to him, Cole, a new bond, or other security, in his own name, and for his own use, for the amount due thereon, or the greater part thereof, but the complainants are ignorant of the date of the said last-mentioned bond or security.

That Cole, further in pursuance of his said fraudulent design, having, by some means unknown to the complainants, obtained possession of the said notes of W. Kirkpatrick, held by Cook as aforesaid, called on Hugh Kirkpatrick, the administrator of said W. Kirkpatrick, who was then dead, and represented himself to be the owner of said notes by pretended assignments or endorsements thereof from Cook, and demanded payment thereof; and that an arrangement was then made, as the complainants are informed, by which Cole received, in his own name, and for his own use, in part payment of the principal and interest due on said notes, an assignment of a bond made by one Samuel S. Doty, of Somerset county, New Jersey, to said Hugh Kirkpatrick, administrator as aforesaid, dated April 24th, 1843, conditioned for the payment of \$2000, with interest, and also an assignment in his own name, of a mortgage given to secure said bond, by said Doty to said administrator, and for the residue of the principal and interest due on said notes, which the complainants charge amounts to \$800 and upwards, Cole received the money from said administrator, or some other security.

The complainants charge that Cole, when he made the said several arrangements with Williams & Co., Cobb and Kirkpatrick, and the said securities for money due to said Cook were changed, as aforesaid, received, from all or some of them, pay-

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ments on account of principal and interest, or both, but of the amount the complainants are ignorant and pray a discovery.

That the complainants have reason to believe that Cook, when he came into the custody and under the control of Cole, as aforesaid, was possessed of money and securities for money other than those before mentioned, and they pray a discovery thereof.

That while Cook was in the custody and under the control of Cole, as aforesaid, he was afflicted with a fit of apoplexy or palsy, terminating in partial paralysis, and that Cook was not, at any time after he came to the hands of Cole, of sound and disposing mind, or of sufficient capacity to manage his pecuniary affairs, or to transact any business whatever; and that any agreement made by him with Cole touching his property, or any authority given by him touching the same, must have been obtained by Cole from him by reason of his imbecility and incompetency to do business, and were fraudulent and void.

The complainants are informed and believe that shortly before the death of Cook, and on or about June 9th, 1845, a person who was formerly acquainted with Cook, and resided in the same neighborhood with him, called at the house of Cole for the purpose of seeing Cook, and inquiring into his condition and health. That Cole was absent. That in answer to inquiries of the person so calling, the wife of Cole said that since Cook had been there he had for part of the time been deranged, and that sometimes he did not appear to know anything; and that he was then an idiot; that he was well, but did not pretend to go out; that it disturbed him so much, and made him so ugly, to see any of his acquaintances or other persons, that Mr. Cole had given orders that no person should be allowed to see him. That the said person so calling, though he represented himself to be an old acquaintance, and was anxious to see Cook, was not allowed to see him.

That immediately after they were appointed administrators, the complainants called on Cole for the purpose of inquiring after the estate of Cook and obtaining possession of it. That in answer to questions then put to Cole, he stated that Cook came to his house the first week in August, 1841; that he then kept a tavern; that Cook was a perfect stranger to him, and in a mis-

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erable condition ; that he was ragged and dirty, and asked for something to eat. That something was got for him ; that he refused to eat it, and wanted some other kind of victuals, which was got for him ; and that he stayed with him, Cole, from that time until his death, and had never been further from the house than the barn. That before he had been there a year, he, Cole, made a contract with him to keep him during his life ; that when Cook came to his house, he came direct from Lawyer Gifford. He said he knew nothing of Cook's papers, property, or effects ; he believed if Lawyer Kirkpartick had lived he could have told something about it, as he understood he had done his business ; that he, Cole, had overhauled all Cook's papers, and had found nothing but some old receipts. That it being thereupon stated to Cole that it was understood that Cook, shortly before August, 1841, held the notes of W. Kirkpatrick, which he was in the habit of carrying about in his hat, Cole answered that he knew nothing about said Kirkpatrick's owing Cook any money ; that he had never seen any papers of Cook of any value or account whatever. That the inquiry was then put to Cole whether he knew of Cook's having any property or effects in New York, and, in answer, he stated that he never could find that he had anything there ; that he had heard he owned some houses in the city of New York, and that he, Cole, had been to New York and examined the records for fifty years back, and could not find that he owned any real estate there. And it being then further stated to Cole that it seemed strange, seeing that Cook had been reported to be a man of property and worth from \$30,000 to \$50,000, that he should have left no estate or property. Cole, thereupon said that if Cook had not have had a stroke of the palsy before he came to his house, he believed he would have been able to have informed him, Cole, about his affairs, and where his money and papers were ; that Cook had one stroke of the palsy before he came to his house, and one afterwards, which wholly deprived him of his speech. And the complainant Davenport having said to Cole that if Cook had no property he would get nothing for the trouble he had had with him, which must have been considerable, Cole answered that he had received enough

to compensate him for his trouble, without specifying from what source or in what manner.

That the complainants are informed, believe, and charge that Cole now holds the said mortgage so as aforesaid given to him for the debt due Cook in New York, and also the bond or other security received by him from Cobb, as aforesaid, and also the bond and mortgage received by him, by assignment from Hugh Kirkpatrick, administrator of W. Kirkpatrick; and that he has collected and received the interest on the same since they came to his hands.

That said Cobb and Hugh Kirkpatrick, when they made said settlements or arrangements with Cole for the debts due from them respectively, to Cook, well knew, or had good reason to believe, that Cook was of unsound mind, and incapable of transacting business.

That the complainants have obtained from the surrogate of New York administration on the estate of Cook, and have filed a bill in the Court of Chancery of New York, and obtained an injunction restraining Cole from collecting or receiving the said debt due from Williams & Co., and restraining them from paying it to Cole.

That, as administrators of Cook, they have applied to Cole for a statement and account of the estate of Cook that has come to his knowledge, hands, or possession.

The bill prays that Cole may set forth what money, securities for money, or effects of Cook were delivered to him by Cook in his lifetime, or have, in any way, before or since Cook's death, come to his possession, &c. And that Cole may be decreed to assign to the complainants the several securities received by him for moneys due Cook in this state, as aforesaid, and to deliver to the complainants all notes, bonds, goods, and effects of Cook in his possession or under his control. And that Cole may be enjoined from collecting or receiving the moneys due on or secured by the note or bond given by Cobb, as aforesaid, or the bond and mortgage given by said Doty, as aforesaid, or any other moneys due Cook at the time of his death, and from assigning said note or bond and bond and mortgage. And that Cobb and Doty may be enjoined from paying Cole the moneys mentioned in

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said note or bond and bond and mortgage, and from doing any other act to prejudice the rights and interests of the complainants in the premises.

The injunction prayed was granted.

Cole answered the bill. He admits the death of Cook, on the 20th May, 1845, and says he does not know, nor has he been informed, and cannot state as to his belief or otherwise, whether or not Cook, at the time of his death, was owner of and entitled to considerable personal estate in New Jersey, or of any effects other than as in the answer is after stated. That he knows nothing of Cook's indebtedness to the estate of Robinson, but if there was any amount due from Cook to that estate, he has been informed and believes it has been more than fully paid to the next of kin of Robinson.

He believes it to be true, and therefore admits that Cook was a man of large property, and had personal estate at the time this defendant became acquainted with him, to the amount of \$10,000 and not exceeding \$11,000 ; and, as he is informed and believes, Cook had owned real estate to the amount of rising \$5000 in New Jersey.

He believes that the wives of the complainants are the next of kin to Cook and his heirs-at-law.

He denies that, during the period of his acquaintance and dealing with Cook, Cook was subject to occasional despondency of temperament or derangement of intellect, or exhibited any mental aberration. On the contrary, he says that, though Cook was affected by a disease which was called St. Vitus' dance, which somewhat impaired the use of his limbs, and rendered his appearance singular, and interrupted his speech, such disease does not, by the course of the disease, and did not in Cook, induce any aberration of mind ; and that, during all the time for that purpose mentioned in the bill, the mind of Cook was sound, and capable of apprehending whatever was presented to it in a rational manner ; that he was in the constant habit of inquiring into his affairs during the whole of that period ; and though his complaint greatly impaired the use of his limbs in walking, and in a considerable degree his speech, he continued able to write, and thereby to explain what he could not do orally ; to make calcu-

lations and to give directions in receiving and making conveyances of property, and in his usual pecuniary affairs, and was fully competent to manage and control his own pecuniary interests and property.

He believes it to be true that Cook was very penurious and miserly in his habits, but whether he ever denied himself the ordinary comforts of life, in clothing or provision, from any such cause, he is not informed, nor does he know.

He believes it to be true that, some time previous to August 1st, 1841, Cook was in the habit of traveling about the country, but only in pursuit of his own business, and stopping at houses, soliciting the inhabitants to take him in, and sometimes sleeping in barns ; but whether the occupants of such houses were strangers to Cook he is not informed, but leaves it for such proof, &c.

He says that on or about August 20th, 1841, Cook came to his house ; he then resided in Saddle River township, Bergen county ; that he had no previous acquaintance with Cook, having never before heard of him ; and that Cook continued to live with him until his death ; that while Cook lived with this defendant he was permitted to go and come as he pleased, though he never went beyond the barn, or off the premises. He denies that Cook was in any manner restricted in going or coming from or to his room, or any part of the neighborhood.

He denies that very little was known of the situation of Cook, but says that the residence of Cook with him was, during the whole period, open, public and notorious, and in no wise concealed, nor sought to be concealed, from the complainants or their wives, or the acquaintances of Cook, or any other person.

He admits that when Cook came to his house there were the following sums of money due him from persons in New York and New Jersey, viz. : a note of R. S. Williams & Co., of New York, for \$85.45, dated June 1st, 1841, payable on demand ; two notes of Walter Kirkpatrick, one dated June 16th, 1834, payable on or before June 26th, 1840, for \$1805, with interest from June 26th, then past, the interest thereon being endorsed as paid to July 3d, 1838 ; the other dated June 21st, 1838, for \$108.30, payable one year after date, with interest, on which one year's interest was endorsed paid. But he denies that there was ever

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known or discovered by him in the possession of Cook any note, bond or other evidence of indebtedness by Andrew B. Cobb, or of any other person jointly with him, to Cook, or for his use, nor were there any securities or evidence of indebtedness of said Cook, other than those before mentioned.

He admits that, at the time last mentioned, Cook had in his possession \$148 in bank bills, and not above that amount in bills and specie.

He denies that he ever took possession of Cook, as alleged in the bill, but admits he entertained him as landlord, and, after the making of the agreement-after stated, took care of and provided for him in all things necessary or proper for his comfort, until his death.

He admits that when Cook came to his house, he was in a ragged, dirty and apparently destitute situation ; that he applied to this defendant for food, which this defendant offered him from the table which supplied his family ; that Cook refused to partake of what was thus offered, and desired to have such food as he particularized, which was then procured for him ; that Cook proposed to remain, and did remain, at his house as a lodger and boarder, defendant then keeping public house, and of his own free will, and without any influence or request by this defendant, continued to board with this defendant until the making of the agreement for his maintenance during life, hereinafter mentioned, and paid for his board agreeably to the terms stipulated between him and this defendant.

He denies that at any period he, or any person, to his knowledge, ever imposed on Cook any species of restraint or control, or that Cook was in any manner kept or concealed.

He says that after Cook had been some few days boarding with him, as before stated, on or about August 25th, 1841, Cook executed and delivered to him a power of attorney, under his hand and seal, in the presence of a respectable freeholder of Bergen, for the purpose of authorizing this defendant to procure sundry articles of clothing which he had left at the house of one Luke Voorhees, and for other purposes therein expressed, which power is ready to be produced and shown to the complainants.

He admits that, during the time Cook lived with him, he, Cook,

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was affected with a fit of palsy, which did not happen until after he had resided with this defendant nearly two years, but he has no knowledge or belief, nor has he been informed, that Cook was ever before affected with a stroke of the palsy; and he denies that Cook was, previous to the said attack of the palsy and after he came to his house, or so far as he has ever heard or known, at any previous time, of unsound and not of disposing mind or of sufficient capacity to manage his pecuniary affairs, but says that at the time and after the said power of attorney was executed and delivered, Cook gave all necessary directions, and a memorandum and schedule of the personal property and effects he wished this defendant to procure for him, in his own handwriting and with all necessary clearness, accuracy, and intelligence, which memorandum and schedule, signed with the name of Cook, is in his possession, &c.

That after Cook had lived at his house about four months he expressed himself much pleased with the accommodation and treatment he had received from this defendant and his family, and, after declaring to this defendant his desire to make an arrangement which should procure for himself a comfortable support during his life, proposed to this defendant to undertake and agree, for the consideration hereinafter mentioned, to support him for the remainder of his life, at his, this defendant's, expense. That the offer so made by Cook, being an inducement to the making such agreement, this defendant, after several days' consideration of the subject, consented thereto, and thereupon called and counseled with George Cassedy, Esq.; and further, on or about December 18th, 1841, applied to Daniel Barkalow, Esq., counselor-at-law, at Paterson, under whose advice and direction articles of agreement were made and entered into, dated December 18th, 1841, between Cook and this defendant, which articles witnessed that Cook, for and in consideration of \$1 to him paid, and of the covenants and agreements therein contained by this defendant to be kept and performed, did assign, transfer, and set over to this defendant, his executors, &c., a certain note for \$8545, made by R. S. Williams & Co., of New York, merchants, payable to said Calvin Cook on demand, and dated June 1st, 1841, and did thereby constitute and appoint this de-

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defendant his lawful attorney, irrevocable, for him, this defendant, but in the name of him, the said Cook, to demand, receive, sue for, and recover of the said R. S. Williams & Co. the said sum of money in the said note mentioned, and all interest due thereon, and to compound for the same, and for any money received thereon in the name of him, the said Cook, to give receipts, &c., and in general to do all and every act or thing that he, Cook, might or could do if that assignment had not been made, and if personally present and acting in the premises, thereby ratifying, &c. And this defendant, in consideration of the premises, did thereby covenant, &c., with the said Cook, that he, this defendant, his executors, administrators, or assigns, should and would, for and during the natural life of the said Cook, furnish and provide him with good and sufficient board and lodging, in all respects as good as that then and theretofore furnished to Cook by this defendant, and, also, with good and sufficient wearing apparel, of a kind and quality in all respects equal to that before worn and used by him, the said Cook; and also do and procure to be done, in a good, neat, and proper manner, all the washing, ironing, and mending of said Cook; and, in case of sickness, provide competent and skillful medical attendance, and necessary and proper medicine, and also proper nursing and attention during such sickness, and furnish said Cook, for his own separate use, with a room, with good and convenient furniture, in the house of him, this defendant, wherever he might reside; and, in general, do and provide all those things which might be necessary to enable said Cook to live comfortably; all which things should be done and furnished at the cost, expense, and trouble of him, this defendant, his executors, administrators or assigns. In witness whereof, the said parties did thereunto set their hands and seals the day and year above written; which said articles of agreement were attested by John P. Outwater, and on the 11th of March, 1843, duly proved by said Outwater, before Richard R. Paulison, one of the masters in chancery, as by a certificate thereof appended to said articles may appear.

That in pursuance of the advice of said counsel, the said articles of agreement were deposited and received in the clerk's

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office of Bergen, on the 11th of March, 1843, and recorded in book, &c.

He says that the firm of R. S. Williams & Co. consisted of Thomas Williams, Jr., Richard S. Williams and Ellis Potter; and he denies that it was a short time after (as is alleged in the bill) Cook came to live with him that he went to R. S. Williams & Co., pretending, as is alleged in the bill, to have the assignment of said note, but says that when, and not until after Cook proposed making the agreement as hereinbefore set forth, this defendant, for his own protection and security, called on said firm of R. S. Williams & Co. to ascertain if the note made by said firm to Cook was genuine and due from them, and informed them of the intention of Cook, and, after being satisfied thereof, this defendant returned home, and the agreement aforesaid was then executed by this defendant and said Cook; and, subsequent thereto, and on or about March, 1842, this defendant applied to said firm for some security for the principal and interest due on said note, when Thomas Williams, Jr., one of said firm, proposed first to call on Cook at this defendant's house, to ascertain whether said note had actually been transferred to this defendant by any such arrangement; and, in about said March, 1842, the said Thomas called accordingly on said Cook, and having satisfied himself that Cook had freely and in a legal and competent manner entered into the said agreement and made such transfer, the said firm did agree to give such further security to this defendant; and after paying to this defendant \$545, or thereabouts, with interest due thereon from the first of June preceding, the said firm did, on or about March 19th, 1842, execute and deliver to this defendant their bond of that date, under their respective hands and seals, conditioned for the payment of \$8000 in one year from the 1st of April then next ensuing, with interest semi-annually, and the said Thomas, one of the said firm, gave his mortgage therefor, of that date, to this defendant, on certain leased premises in the city of New York, (describing them.) And, on the receipt of the said bond and mortgage, this defendant gave up the said note of said firm. And he denies that the said bond and mortgage were given for other moneys than were due, as aforesaid, on said note. He says he has received

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on the said bond and mortgage, at different times, \$1000 in the whole.

He says he has no knowledge or information of any note or bond given by Andrew B. Cobb to Cook or for his use, except from the bill, and denies any negotiation for changing securities with said Cobb as alleged in the bill.

He admits he called on H. Kirkpatrick, administrator, &c., of W. Kirkpatrick, deceased, and represented himself to be the owner of the two notes given by said deceased to Cook; but he denies that there was any pretended assignment of said notes from Cook to him.

He says that, when Cook came to live with him, he was the owner of a house occupied by him, and engaged in a very profitable business, and that his said property was justly valued at \$6000. That, after the said agreement was entered into between him and Cook, he found it inconvenient, by reason of the personal care and attention to be devoted to Cook, according to said agreement, to reside at the house he occupied when Cook came to him, and he sold his said house at a less price than he would have done at any other time and under any other circumstances, and removed to another house, not far distant, in the same neighborhood, when it became necessary to build an additional room, expressly for the better accommodation and comfort of Cook and the better attendance on him by this defendant, which always, during Cook's continuance with him, he devoted to him personally, in every service he required for his convenience and comfort. That Cook, after living with him for nearly two years, and expressing himself satisfied and pleased with the treatment he had received, stated that he confided in the arrangement before mentioned as to him, Cook, for his life; that he had no relations who exhibited any care for or had any feeling for him, but had neglected him when he most required their attention; that he had become attached to this defendant and his family; proposed to this defendant to take an assignment of the said notes, on or about August 19th, 1842; and thereupon caused an assignment to be made, bearing that date, assigning to this defendant the said two notes drawn by W. Kirkpatrick, with all necessary power to recover the same; which assignment was

duly attested by John E. Vanderbylandt, and was, on the 10th of March, 1843, proved by him before Cornelius Van Wagenen, a judge of the Common Pleas of Bergen, and was, on the 11th of said March, recorded in the clerk's office of Bergen.

He says that an arrangement was made between said H. Kirkpatrick and him ; that he received, in his own name and for his own use, \$300, or thereabouts, and for the balance of said notes the said H. Kirkpatrick, on the 22d of May, 1843, assigned to this defendant, by an assignment of that date, a bond, dated April 24th, 1843, made by Samuel S. Doty to said H. Kirkpatrick, administrator as aforesaid, conditioned for the payment of \$2000, with interest, in two years, and a mortgage, of the same date, executed by said Doty and his wife, to secure the said bond, on a certain tract of land, (describing it,) on which said bond endorsements have been made of interest received by this defendant to April 24th, 1845.

He denies that when said arrangement was made with said Hugh Kirkpatrick, the said Hugh Kirkpatrick knew, or had reason to believe that Cook was unsound in mind, and incapable of transacting business ; but, on the contrary, that he, the said Hugh, was satisfied of the competency of said Cook in law to understand the nature of such a transaction, and to approve thereof.

He denies that he ever entertained any determination fraudulently to dispossess Cook of all or any part of his property, or that, with any such purpose, he ever applied to said Williams & Co., or Samuel Doty, to change the securities given by them respectively to Cook, or to have them, or either of them, or any part thereof, assigned to him, from any other inducement, or for any other object than as in his answer is before stated.

He admits that Sarah E. Crawford called at his house and was informed that Cook did not then go out of his room ; that the time when she called was about November, 1842 ; but he denies that he or any of his family informed her that the family did not wish Cook to see any of his friends or acquaintances, or that he acted so bad that he could not be controlled ; or that she was permitted to see Cook but momentarily ; but says that said Sarah had every facility offered her for seeing Cook, and.

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did see him at that time as often and as freely as she pleased, and had such conversation with him as she thought proper, without any impediment, interruption or hindrance by this defendant or any other person; and that said Sarah stayed at this defendant's house two days and two nights.

He admits that said Sarah offered to take Cook to live with her, and that this defendant declined such offer, and then informed her of the agreement made between Cook and him.

He says that, having stated to said Sarah that he had bound himself, as hereinbefore stated, to keep Cook during his life, she expressed herself pleased.

He says he knows not and cannot remember that the complainant Davenport called on him immediately after the alleged taking out of letters of administration, for the purpose of inquiring into the estate of Cook and taking possession thereof, as stated in the bill, other than he is informed thereby; but he says that if Davenport did call, this defendant was not informed of the name of the person so calling and of those who accompanied him; but he says that a person, who he afterwards understood was named Benjamin Crane, called, about the time for that purpose mentioned in the bill, with two persons, and used the expression "we have come as administrators of Calvin Cook;" but said Crane made no introduction of the persons, or either of them, by name, nor did he or either of the persons exhibit any documents whatever. But after Crane had left this defendant's house, this defendant first learned the name of said Crane from this defendant's wife, who had seen him when he had communicated to her that he, Crane, had made a settlement with Cook, about a year previous, and paid Cook a sum amounting to \$700, and that during the interview with said Crane and the other persons in his company, by the bill alleged to be administrators of Cook, this defendant referred them to said Crane, not knowing that he was present, and not knowing him by name or person, for information respecting Cook's property, as, from his own statement as aforesaid, most competent, as this defendant presumed, from long acquaintance with Cook, and having transacted business with him, to give such information.

He says he has no recollection as to the several matters of

conversation with said persons alleged in the bill, or any questions touching or relating to the same, or statements made to this defendant as to the said Cook's being a man of property, at the time last mentioned and referred to, and therefore cannot admit or deny the truth of such conversation.

He denies that, shortly after the death of Cook, the said Crane called at his house in his absence, as alleged in the bill, on the 9th of June, 1845, but says he is informed and believes that a person answering the description of said Crane called on some day previous to the death of Cook, and desired to see Cook; that Cook was unwilling at any time to see visitors, unless they were invited by himself; that often, when he did request the company of persons, after their being with him a short time, he would abruptly place his hand on them and move them towards the door, desiring them to go, and exhibiting at such times, if any opposition was made, a great degree of nervous excitement, whilst he was perfectly conscious of his situation, and would be composed after the departure of such visitors.

That the conduct of Crane was so mysterious, claiming no affinity to Cook, having no ostensible business with him, and being an utter stranger, and showing no official cause for claiming such admittance, and in the absence of her said husband, and under the peculiar disposition and habits of Cook with respect to the introduction of visitors, as before stated, the wife of this defendant refused to admit the said visitor; and this defendant is not informed, and therefore cannot say, whether said Crane had such conversation as is mentioned in the bill with the wife of this defendant, and therefore cannot admit or deny the same.

He says it was by the express request, and in pursuance of an arrangement with the complainant Crawford, that this defendant went to the city of New York to learn, if possible, whether there was any real property in that city belonging to Cook, and the situation thereof. That Crawford had informed him that Cook was the owner of one or more houses in Cherry street, New York, and arranged to meet this defendant in New York, for the purpose of looking after said property. That, in pursuance of such arrangement, he went to New York to meet Crawford, and made a very brief examination of the records; but Crawford

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failed to meet him ; and this defendant found no such property in the name of Cook.

He admits the fact stated in the bill, but not as having expressly stated it at any conversation, that he examined the records in the city of New York, some time in the spring of 1844, for real property that might be standing in Cook's name, for the period stated in the bill, but found none standing in the name of Cook or for his use. But he is informed and believes that Cook was possessed of and entitled to in his own right, certain real estate in Morris county, New Jersey, before he came to this defendant's house to reside. That, by a search in the clerk's office of that county which he has caused to be made, it appears that Cook has conveyed, for the nominal sum of \$1, to the said Davenport, by deed dated March 7th, 1831, a tract of land in the township of Hanover, in said county, containing 10 58-100 acres ; and he also discovered on said records another deed from said Cook to said Davenport, for the nominal sum of \$1, dated March —, in the same year, for certain other premises containing 26 1-2 acres ; and also another deed for lands in said county, to the said Sarah Robertson, before her marriage with the complainant Crawford, for the nominal consideration of \$1, for three tracts of land—one of 33 54-100 acres ; one of 11 70-100 acres ; and one of 7 7-100 acres, recorded May 14th, 1831.

That it further appears by the said records, that the real estate so conveyed by Cook to Davenport, has been conveyed away by him for a sum or sums amounting to more than \$2000, and that two of the lots so conveyed by Cook to the said Sarah, containing 16 acres, or thereabouts, have been since conveyed away by her for \$500, or thereabouts.

He denies that he has at any time become possessed of any money, or securities of any description, of said Cook, other than those before mentioned. He believes it to be true that the complainants have obtained administration of his estate, and filed a bill in chancery in New York, and obtained an injunction, as stated in the bill.

He denies that the complainants, as administrators of Cook, have ever applied to him for any statement or account of Cook's effects, unless the application as hereinbefore stated to have

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been made by said Crane was for that purpose, when, as this defendant says, there was no such request made, or requirement in words, for any such statement.

He denies that he ever entertained any fraudulent design to dispossess Cook of any of his property, or that he ever sought to acquire the property, to possess it, or any part thereof, to his own use, or in any other manner, or for any other purpose or consideration than as has been hereinbefore stated to have been done at the suggestion of said Cook himself, at times and under circumstances that would have justified his, Cook's, attention to his own business and concerns as legally and equitably as at any other period of his life.

Much testimony was taken on both sides.

Asa Whitehead and Samuel Sherwood, for the complainants.

A man may have a capacity to make a will, and yet insufficient for the management of other business. 26 *Wend.* 306; 4 *Cowen* 207; 3 *Wash. C. C. Rep.* 386.

Facts and circumstances are to be considered, rather than the opinions of witnesses. 1 *Green's Ch.* 13; 8 *Mass. Rep.* 371; 11 *Ves.* 11; 5 *Johns. Ch.* 158.

Inadequacy of consideration, though not conclusive, is still to be regarded. 4 *Cowen* 208; 1 *Bro. Ch.* 1, 150, 563.

In equity, fraud will be presumed from the position and circumstances of the parties. 4 *Cowen* 221; 4 *Dessau.* 684; 2 *Ves.* 155.

Equity will set aside a deed by reason of influence of the party obtaining it, and confidence in the party granting it. *Shelford on Lunacy* 317; 1 *Ves., Sr.*, 379; 2 *Atk.* 279; 2 *Ves.* 259.

A. Gifford and B. Williamson, for the defendant. They cited *Shelford on Lunacy* 36, 37, 39, 50; *Cooper's Med. Juris.* 328; 3 *P. Wms.* 128; 2 *South. Rep.* 669; 5 *Johns. Ch.* 144; 3 *Bro. Ch.* 442; 2 *Phil. Ev.* 293; 1 *Dow's Parl. Cases* 177; 2 *Atk.* 340; 19 *Ves.* 506.

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THE CHANCELLOR. The testimony is so voluminous that I shall not attempt to give a statement of it in detail.

The pleadings and evidence show, satisfactorily, that Cook's mind was greatly impaired; that Cole's position in reference to him was such as to subject him to an undue influence and control over him by Cole; and that the consideration to be given by Cole for the property transferred to him by the agreement, was greatly inadequate. These three considerations united are sufficient to set aside the agreement.

Decree for complainants.

MARY FORD v. CHARLES FORD.

Insufficient proof of desertion, on petition for divorce.

The petition filed February 4th, 1846, states that the petitioner and the defendant were married February 27th, 1813, at Nimsfield, Gloucestershire, Great Britain; that after their marriage they came to America, and settled at Belleville, in the county of Essex, in this state; and that from that place they removed to the city of New York, in the year 1837; that the defendant, her husband, lived with and supported the petitioner for about sixteen years after the marriage, until August, 1838, when he deserted her, and left New York, and returned to Belleville, where he has resided for the last seven years. The petitioner charges a willful, continued and obstinate desertion for more than five years; and that, during all that time, he has wholly failed to make any provision for her support, and prays a divorce on that ground.

The defendant put in an answer.

He admits the marriage; states that he arrived in this country in 1827; settled at Belleville in 1828, and sent for his wife

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and children, who were then in Great Britain, and that they joined him at Belleville in that year. That in 1837 the petitioner, with James Croft, who married Susannah, their eldest daughter, moved to the city of New York; that Croft contracted to purchase, for \$1200, half in cash and the balance at eight months' credit, the furniture, liquors and fixtures of a public house in Pearl street, New York, known as the "Brown Jug," and went into possession of said house; and that the defendant, in about three weeks thereafter, removed from Belleville to New York, and took up his residence with the petitioner at the said house.

He denies that he deserted his wife, as stated in the petition, and states that, some months after he moved to New York, as aforesaid, he left that city for Rahway, New Jersey, his object being to work at his trade, with a son of his by a former marriage, who lived there and carried on the business of a blacksmith; that he left New York because the petitioner insisted on his quitting the said house in Pearl street, and that she gave him money in order to induce him to go, for that though the said house was nominally in his occupancy, and the business thereof was ostensibly carried on in his name, yet that the avails of the business were appropriated by the petitioner, or the said Croft, or both of them; that he remained in Rahway until March, 1838, during which time he was in the habit of visiting his family in New York, from time to time, and remaining a day or two; that during these visits he was made to sleep in the bar-room, and debarred from the enjoyment of his rights as a husband; that in March, 1838, he returned to Belleville, where he remained until July, 1838, and that from that time until June, 1839, he resided at New Brunswick and Millstone, in New Jersey; that in June, 1839, he returned to his family in New York, where he remained until February, 1840, and during this time was treated with much indignity by his wife, and was not admitted to his marital rights; that from February, 1840, he has resided in Belleville, in this state.

He denies that he has ever deserted his wife; says that his home is at Belleville, and is ever open to receive his wife and children; that his wife and children have, several times, within

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the last five years visited him there ; that he has been in the habit of visiting his wife and family in New York, repeatedly, every year since their residence there, until the 29th September last, (1845,) when the petitioner told him that if he would take care of himself, she would take care of herself ; that he then offered his protection to her and the children, if she would return to Belleville ; that she refused to comply, refused to shake hands with him, and told him never to come back again.

He states that of the \$1200, the cost of the furniture, liquors, &c., of the said public house in Pearl street, he paid \$1000, and states how he did it, and what property he conveyed and mortgaged to do it, and to whom ; that his household and kitchen furniture was removed from Belleville to the said house in New York, the value of which, added to other articles either purchased or paid for by him, would amount to \$500, making, altogether, \$1500, which he has advanced for the support of the petitioner and family, and that not an article or dollar of it has ever been returned to him ; that it was by the avails of his capital, thus advanced, that the petitioner has been enabled to establish herself in New York in a lucrative business ; that she now conducts a public house, as landlady thereof, situate in Canal street, in New York, known by the name of "Madison Hall," the rent of which is \$400, as he has been informed and believes ; and that she now conducts herself as a *feme sole*, her name appearing in the directories of said city as "Mary Ford, widow, 48 Canal street ;" he states that the petitioner has made large sums of money by trading on his capital aforesaid, which legally belongs to him, and gives an instance of the purchase of a lot of land in Belleville by her, two or three years ago, the deed for which was, by her directions, made out to one Daniel Samson of the city of New York ; he says that he is anxious that his wife and family should return to his domicile in Belleville ; that he has always been, and is now ready to receive them, and afford them his protection and support.

Sarah S. Smith, a married daughter of the parties, testifies that in 1837 her brother-in-law, Croft, and her parents bought the said public house in Pearl street, New York ; that her father was then carrying on the blacksmith's business in Belleville,

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New Jersey ; that it was thought best that her father should remain in Belleville and carry on his business ; that she was left to keep house for her father ; that her father, herself, and furniture were afterwards removed to New York, to said house in Pearl street ; it was called the Brown Jug ; there her father, mother, brother-in-law, Croft, and all the family lived ; mother assisted in the work for the boarders ; her father and Croft attended in the business ; the business was not as good as they expected, and her mother said that some of the family had better go to work, and, accordingly, Croft went to the country and got work and sent for his wife ; her father then attended to the business himself ; he was unsteady ; mother said father had better go to work in New York and get some money ; he did not get work in New York ; he went to the country ; he returned in about a month ; mother asked father for money, after his return from the country ; he said he had none, she had all the money ; she said she had not any to pay the bills with, and they were handing in every day ; her father was cross about it ; said the business ought to be better, and abused her mother about it ; he stayed some days, and then went to the country again ; he asked mother for money to pay his fare, and she gave it to him ; this was in 1838, she thinks, while they lived at the Brown Jug ; in April, 1839, their furniture, fixtures, and everything were sold for rent ; they had nothing left but what the law allowed them ; a gentleman by the name of Samson, a liquor merchant, told mother if she would get a store he would stock it with liquors, on trust ; but mother was quite discouraged and said no, everything was gone ; witness and mother took a small store in Duane street, and one room ; father came into the store in Duane street, on the 4th of July, 1839 ; he passed in and out of the store, and scarcely spoke to witness or her mother ; as he was passing out, mother asked him to stay ; he spoke abuseful to her, and passed on ; we did not see him again until two days after, when he came home and remained a few days, and then went into the country ; he gave no money to any of the family, that witness knows of ; he was obliged to sleep in the bar-room, for we had only one room besides.

They moved from Duane street, in May, 1840, to West Broad-

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way ; by their industry and exertions they got sufficient money to take a larger place ; the one in Duane street was too small ; they received no assistance from father ; he never lived at home with them after the close of 1838 ; he has called, occasionally, ever since, to see his family, but never made it his home, or assisted them in any way.

On cross-examination, she says—Mother now attends business at 415 Broadway ; she has done business there since the 1st of May last, (1846 ;) before that time she resided and did business at 48 Canal street ; it was a tavern or saloon ; kept a bar and took boarders ; it was called “Madison Hall,” which appeared in the directory as Mary Ford, widow, 48 Canal street ; they lived four years at 48 Canal street ; mother leased it ; the rent was \$400 a year ; the lower part of the house, mother rented out ; she does not know who leases the property 415 Broadway, her sister or mother, or who pays the rent ; the business at 415 Broadway is profitable ; she does not know that her father has any of the avails of it ; she has not seen her father in the last six months ; witness was away from her mother from May, 1841, when she was married, until April, 1843 ; it was an agreement between father and mother that father should go into the country for work ; when Mr. Samson made advances of liquor he took no security ; we had none to give ; she don't know that his bill for liquors has ever been paid ; father has a son, a half-brother of witness, at Rahway, New Jersey ; he is a blacksmith ; father and Mr. Croft paid for the fixtures, &c., at the Brown Jug.

A son was sworn on the part of the petitioner, but testified nothing material.

Mary Ann Ford, a daughter of the parties, aged 12 years, was sworn for the petitioner.—She says her father lives in Belleville ; that he has never been at home more than one or two days at a time, since she can recollect ; he then behaved very cross to mother ; always scolded her ; mother was afraid of him ; when he came there she would lock herself up in a room ; she locked herself up that he might not hurt her ; when he came, he was sometimes sober, but generally intoxicated ; when witness saw her father coming, she would run and tell her mother,

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that she might run and lock herself up. Witness and her little sister used to run and hide under the bed, that father might not see them, for if he saw them he would make them tell where mother was; father never bought her any clothes but once or twice; on the 4th of July gave her a sixpence or tenpence.

On cross-examination, she says she used to run and tell her mother when her father was coming, without being told by her mother to do so; she knows her father lives in Belleville, because she has been there; she was there about two or three years ago with a younger sister; they stayed at a neighbor's; sometimes was at father's during the day; mother put them in the stage, and paid their fare to Belleville; they stayed about a week; slept at a neighbor's; ate in father's house once or twice; father put them in the stage to go to New York; mother paid the fare when we got to New York; mother was never cross to father when he came to New York; she knows her father was cross to her mother, because she (witness) was there; mother was not always locked up in the room; she knows her father wanted to hurt her mother, because he looked so cross at her; she never heard her father say he came there to hurt her mother; no person told her what she was to swear to; she was told some questions that would be asked her; not many; the paper she had in her hand just now was a paper which had on it what she was to prove.

In chief, she says the paper was intended to assist her memory in case she should be frightened; her mother told her to tell the truth when she came over here.

Susannah Croft, a married daughter, was sworn for petitioner, but she testified nothing which falls within the range of inquiry in the case.

P. D. Vroom, for petitioner, cited 1 *Haggard's Eccl. Rep.* 733; 2 *Adams* 27.

W. K. McDonald, contra.

THE CHANCELLOR. The proof falls far short of making out

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a case of desertion by the husband. The prayer of the petition is denied.

Whether a desertion by leaving a wife and family in another state, and coming to reside in this state, the marriage not having taken place in this state, is within our legislative provisions on the subject of divorce, need not now be considered.

JOHN SHAEFFER AND WIFE AND OTHERS v. ROBERT CHAMBERS.

1. A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it.

2. He is bound to keep it in good ordinary repair; and, if it be a farm, he is bound to good ordinary husbandry.

3. A mortgagee of a farm, having taken possession thereof, must show reasonable diligence to procure a tenant, or he will not be relieved from the charge of rent, on the ground that the farm was not cultivated. And if he cannot find a tenant for the buildings and the farm, he should cause the farm to be tilled.

4. Annual rents allowed against a mortgagee in possession when the annual rents and profits, and wood and timber cut from the premises, exceeded the interest and expenses.

On the 17th of October, 1842, a bill was filed by the surviving children and heirs-at-law of Joseph Lord, deceased, and the husbands of the daughters of said deceased, and his widow, stating that said decedent, in his lifetime, and at the time of his death, was seized of a tract of land in the township of Nottingham, formerly in Burlington county, now in Mercer, (describing it,) containing 85 20-100 acres; and being so seized, gave a bond to one Lewis Evans, dated November 13th, 1820, conditioned for the payment of \$500 in two years, with interest, payable yearly; and that, to secure the payment thereof, the said decedent, with the said Martha, then his wife, gave a mortgage, of the same date, to the said Evans, on the said tract of land.

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That Evans assigned the bond and mortgage to the defendant on the 25th of May, 1821.

That on the 22d of June, 1820, the said decedent mortgaged the said land to Joseph Douglass, to secure the payment of a bond for \$625.61, with interest, given by him to said Douglass; that on the 27th of November, 1826, Douglass assigned the last-mentioned bond and mortgage to the defendant.

That on the 23d of May, 1822, the said decedent gave a bond to the defendant Chambers, conditioned for the payment of \$200, in one year, and to secure the same the said decedent, on the same day, executed to Chambers a mortgage of the same tract of land.

That the said Joseph Lord died intestate in 1825, and that no administration has ever been taken of his estate; that at the death of the said Joseph Lord, all his children were infants except one, named Samuel, who has since died intestate, without issue; that the complainants Rachel, Sarah and Emeline, respectively, married while they were infants, and have remained covert ever since, and that the complainants Richard, George and Charles Lord have, respectively, attained 21 within the last ten years; that after the death of the said Joseph Lord, and while his children who are complainants were severally under 21, the defendant, as mortgagee, entered into the possession of the said mortgaged premises, and the receipt of the rents, issues and profits thereof, and still continues in such possession and receipt, and while thus in possession has cut down the trees and timber, of which there was a large quantity standing thereon, and has cut down 2000 cords or other large quantity of wood from said premises, and made market thereof, and applied the same to his own use.

That on the death of the said Joseph Lord, the complainant Martha, his widow, became entitled to dower in said mortgaged premises, subject to keep down one-third of the interest of the mortgage so executed by said Joseph Lord and her to said Evans, which she professes herself ready to pay.

That on the 16th of January, 1827, the said Chambers exhibited his bill for the foreclosure of the equity of redemption, or the sale of the mortgaged premises, to satisfy the said several

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mortgages, to which the said Martha filed her answer, insisting on her claim to dower in said mortgaged premises ; and such proceedings were thereupon had that on the 23d of July, 1831, the said bill was dismissed for want of prosecution, with costs.

The bill charges that payments were made by Joseph Lord, in his lifetime, on account of the mortgages, and that what remained due at his death has been paid by the wood and timber cut by Chambers from the premises, and the rents and profits received by him, or which he might have received, while in possession, without his willful default.

The bill prays that an account may be taken of what is due on the mortgages, and of the amount and value and avails of the wood and timber cut by the defendant during his possession, and of the rents and profits received by him, or which, without his willful neglect or default, he might have received since he took possession ; and that, in taking such account, rests may be made from time to time, when and as the value and proceeds of the wood and timber and rents shall appear to have exceeded the interest in arrear ; and that if any balance shall be found due to the defendant, then, that upon payment of such balance, the defendant may be decreed to deliver up possession ; and that if the defendant has received more than is due him, he may be decreed to pay the surplus to the complainants ; and that one-third part of such overplus may be decreed to the said Martha, or whatever may be found due to her on taking an account of the sum due on the said mortgage to Evans ; and that one-third part of said premises may be assigned to her for her dower.

In July, 1843, the defendant put in his answer. He admits that, on or about the 1st of April, 1826, there being a large arrear of interest unpaid, he, by the consent and request of the said Martha Lord, and of her friend and adviser, Benjamin Lord, entered into possession and received some of the rents ; but he denies that he has received sufficient rent to pay the interest on the several mortgages and to pay the taxes and necessary repairs ; and he denies that he has cut 2000 cords of wood, though he admits that he has cut trees on the premises for rails and posts and necessary repairs.

He denies that the mortgages have been paid, and insists there

is a large arrear of principal and interest due thereon.

He says he was very unwilling and reluctant to take possession, and that he offered to said Martha to deduct \$300, if she would pay the balance of the bonds and mortgages; and that he preferred settling in this way to taking possession. But that she said she was unable to pay, and preferred he should take the premises for his pay.

He says that when he took possession of the premises they were not worth the amount due on the mortgages by \$500, and that since he took possession several of the tenants have failed and wholly neglected to pay their rents, notwithstanding he used all diligence to recover the same.

He says that one of the tenants to whom he had rented the premises, viz., Ephraim B. McIntyre, when he was ready and able to pay the rent to him, was forbidden by Mrs. Shaeffer, one of the complainants, to pay the same, she claiming to be entitled thereto, or to some part thereof; and that in consequence of such notice, the said tenant refused to pay the rent to this defendant, and that said tenant has since failed and become wholly unable to pay the same.

He says he has been unable, this year, to rent the premises.

He denies that the complainants, or either of them, ever applied to him to account for the rents and profits, or for the wood and timber cut by him, and insists that the said Martha Lord having voluntarily relinquished her right to redeem, and induced him to take possession, she should not now be permitted to redeem.

Evidence was taken in the cause.

On the 1st of October, 1845, a decretal order was made, referring it to a master to take an account of what is due Chambers for principal and interest on the several mortgages, and an account of the wood and timber cut by Chambers from the mortgaged premises, and the time when, and the value thereof; and an account of the rents and profits which have come to the hands of Chambers, or which he without his willful default might have received; and an account of all moneys expended by Chambers in necessary repairs and for taxes, and that what shall be found to have been so expended be deducted from what shall be coming

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on the account of the wood and timber, and rents and profits. And if the master shall find that the rents and the value of the wood and timber cut, exceed the amount so paid for repairs and taxes, and the interest on the mortgages, the master is to make annual rests; and that what shall be coming on account of wood and timber and rents and profits be applied, first, in payment of the interest on the mortgages, and then in sinking the principal; and that what shall be coming on account of wood and timber cut and rents and profits be deducted out of what shall be found due Chambers for principal and interest, reserving the question of the propriety of annual rests.

The master's report came in on the 16th of May, 1846.

The master reports that there was due on the Douglass bond and mortgage, on the 1st of April, 1826, for principal and interest..... \$823 49

On the mortgage to Evans, on the 1st April, 1826, for principal and interest..... 689 55

On the Chambers mortgage, on the 1st of April, 1826, for principal and interest..... 253 96

 \$1767 00

That the amount of principal due on that day, on the said three mortgages, was.....\$1325 61
and the amount of interest..... 441 39

 \$1767 00

That the defendant went into possession of the premises on the said 1st of April, 1826.

That there was upon the premises about 25 acres of wood, averaging 12 cords to the acre.

That 264 cords were cut and sold by the defendant, worth \$2.50 a cord, exclusive of the expense of cutting and carting to market.

That 60 cords thereof were cut and sold by the defendant in the winter and spring of 1832 and 3, of the value of \$150.00 and that he has charged the defendant this amount on the 1st of April, 1833.

That 100 cords were cut and sold by the defendant

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in the winter and spring of 1833 and 4, of the value of \$250 00 and that he has charged the defendant with that amount on the 1st of April, 1834.

That 100 cords were cut and sold by the defendant in the winter and spring of 1834 and 5, of the value of 250 00 and that he has charged the defendant with that amount on the 1st of April, 1835.

That, in 1837, the defendant cut and sold wood and faggots of the value of..... 69 15 which he has charged to the defendant on the 1st of April, 1837.

That, in 1838, the defendant cut and sold faggots to the value of..... 7 85 which he charged to the defendant on the 1st of April, 1838.

That, in 1826, the defendant leased the premises to Henry and William Reed for one year, for \$100. That the lessees failed, and only \$50 was recovered on the 1st of October, 1826, and he charges defendant, October 1st, 1826..... 50 00

The master then reports that it does not satisfactorily appear to him what the defendant received from the premises in the years commencing April 1st, 1827, 1828, 1829, and 1830, or, if they did not produce the same annual rent, that said loss was not occasioned by the default of the defendant, and that he has therefore charged the defendant with \$100 on the 1st of April, 1828..... \$100 00

April 1st, 1829..... 100 00

April 1st, 1830..... 100 00

April 1st, 1831..... 100 00

That, for the year ending April 1st, 1832, the premises were rented to Robert C. Mount, on shares, and that the defendant received therefor \$80, and he charges defendant, April 1st, 1832..... 80 00.

The master then states that he charges the defendant with the same amount on the 1st of April, 1833, though the premises were not rented, it not appearing satisfactorily to him that they might not with due dili-

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gence have been rented for that amount..... \$80 00

That, for the years ending April 1st, 1834, and April 1st, 1835, James Hunt rented, and paid defendant for the premises, \$75 a year ; and he therefore charges the defendant, April 1st, 1834..... 75 00
and April 1st, 1835..... 75 00

That, for the eight years commencing April 1st, 1835, and ending April 1st, 1843, the premises were rented to, the McIntyres, or one of them, part of the time on shares, and part of the time at \$100 a year. That it does not satisfactorily appear what the yearly share of the defendant amounted to, when the place was let on shares, and that he has charged him with \$100 in each of those years except the last, in which, he is satisfied, the rent was lost without any default of the defendant. He therefore charges defendant, April 1st, 1836..... 100 00
April 1st, 1837..... 100 00
April 1st, 1838..... 100 00
April 1st, 1839..... 100 00
April 1st, 1840..... 100 00
April 1st, 1841..... 100 00
April 1st, 1842..... 100 00

That, for the year ending April 1st, 1844, the premises were not rented, but that it does not satisfactorily appear to him that they might not have been rented, if reasonable diligence had been used ; that, since then, the premises have been rented to Pearson Reed, and have produced, as it appears in evidence, \$60 a year ; and that he has therefore charged the defendant at that rate, from the 1st of April, 1843, to the date of the report—that is to say—

April 1st, 1844..... 60 00
April 1st, 1845..... 60 00
April 1st, 1846..... 60 00

The report is dated May 15th, 1846.

That he has taken an account of the moneys expended by the defendant in repairs and taxes, and has allowed him, April 1st, 1831..... \$17 63

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April 1st, 1834, for posts and rails.....	\$31 10
April 1st, 1835, for ditching	36 00
April 1st, 1836, for lime.....	45 00
April 1st, 1837, lime.....	5 00
April 1st, 1839, fencing, repairs, lime, &c.....	67 26
April 1st, 1842, for repairs.....	15 98

That during a portion of the time, the wood and timber and rents and profits exceeded the interest and expenses of necessary repairs; and that he has accordingly made rests and applied the income of the property first, to the reduction of the expense accounts and interest, and then to the reduction of the principal of the mortgages.

And that at the date of his report, the whole amount remaining due the defendant on his said mortgages, after paying expenses and making all just allowances, is \$1401.66.

Exceptions to this report were filed on the part of the defendant as follows:

1st. That defendant ought not to have been charged with rent for the year ending April 1st, 1828, either according to the terms of the decretal order, or in equity, or if chargeable at all for the said year, he is charged too high, and more than he received.

2d. That the master has charged him, on the 1st of April, 1830, one year's rent not accounted for, \$100, whereas he ought not to be charged for that year, or if to be charged, he is charged too high; and that the master has omitted to deduct \$5, which, by the terms of the lease under which the said farm was rented, the exceptant was bound to furnish and did furnish, to be used on the premises, and also omitted to deduct any sum for the value of stacks left by the exceptant on the premises to induce the tenant to rent the premises.

3d. That the master has charged the exceptant, April 1st, 1834, (it means, probably, 1833,) one year's rent not accounted for, when he ought not, or if anything is charged, it is too high, and more than he received.

4th. That \$60 is charged for the year ending April 1st, 1843, (it means 1844,) which ought not to have been charged, because the premises were not rented that year and could not be.

5th. For that the master has charged him with \$50, October

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1st, 1826, as received of Reed, being more than he received ; and that the master omitted to deduct that part of the rent which was to have been paid in work, which was not performed by the tenant, and because the master omitted to make a rebate of interest on account of the payment of the rent before it was due.

6th. For that the master has only credited him, April 1st, 1836, for 450 bushels of lime, at ten cents, \$45, when he should have credited twelve cents.

7th. That the master has charged him one year's rent, ending April 1st, 1844, \$60, when he should not have been charged with any rent for that year, because the premises were not rented that year, and because he received no rent that year for said premises.

8th. Because the master has charged him for 1 year, 1 month and 15 days' rent, as received from P. Reed, tenant, \$67.50, when he ought not to have been charged with that sum, because said sum was not received, and because that portion of the rent supposed to have accrued between the 1st of April and the 15th of May, did not become due until the end of the year.

9th. For that the master has made annual rests in stating the account against the exceptant.

W. Halsted, for the exceptant.

As to the 1st, 2d, 3d, 4th and 6th exceptions, a mortgagee not in the actual possession of the mortgaged premises, is bound to account only for the profits actually received by him. 1 *Vern.* 45 ; *Powell on Mortgages* 272 ; 4 *Kent's Com.* 159, 160, 166 ; 12 *Ves.* 493.

As to the 9th exception, a court of equity will not require annual rests to be made if the interest on the mortgage is in arrear when the mortgagee takes possession, even though the rents and profits may exceed the annual interest, nor until the principal of the mortgage debt be entirely paid off. 2 *Story's Eq. Jur.*, § 1016, *a*, *note* ; 4 *Kent's Com.* 166, 7.

G. D. Wall, *contra*.

THE CHANCELLOR. On reading the testimony, I do not see any good reason why the report of the master should not be confirmed.

A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use.

If it be a farm, he is not at liberty to let it lie untilled because the house on it, or the house and farm together were not rented. I see no reason why the farm should not be husbanded, though the buildings on it were not rented.

Again, a mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair, and if it be a farm, he is bound to good ordinary husbandry.

It appears by the testimony that, for several years of the time during which the defendant has been in possession, the property was not rented, and the whole of it, farm and all, was permitted to lie uncultivated. The master reports that it was not made satisfactorily to appear to him that the property was thus unoccupied without the default of the defendant. The ground here taken by the master raises this question: a farm of 85 acres, 25 of it in woodland, under mortgage, is taken possession of by the mortgagee, and rented. He remains thus in possession a number of years. Occasionally, during this period, the premises are vacant and the farm untilled. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them, or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his willful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in 1 *Vern.* 45; or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Campion*, 1 *Moll.* 233?

It seems to me that it will not do for the mortgagee, having

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thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But, at all events, if the farm and buildings are not rented, he ought to cause the farm to be tilled, and that in a husbandlike manner.

From the testimony, I think the defendant has been negligent, to say the least, in the manner in which he has treated the premises. No provident owner would have treated them as he has. They have been permitted to go greatly out of repair, and the lands have been so badly husbanded that, for several of the last years, the whole premises, rented at first by the mortgagee for \$100, have rented for only \$60, and he has been charged but that sum.

The defendant, during several years, cut wood and timber from the premises, and sold it. The master, in stating the account, made annual rests when he found that the wood and timber, and the rents and profits exceeded the interest and expenses, and applied the income, first, to the interest and expense account, and then to the reduction of the principal. This was objected to on the part of the defendant. It seems to me the master was right.

I am satisfied with the general result reached by the master.

Exceptions disallowed.

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CHARLES M. ARMSTRONG, WILLIAM L. SALTER AND WIFE
ET AL., v. WILLIAM KENT, ANDREW C. ARMSTRONG
ET AL.

1. M. A. devised and bequeathed all the rest and residue of her estate, real, personal, or mixed, to E. R. A., to be by her possessed, enjoyed, and occupied to her and her heirs forever; but if she should die without heirs, and intestate, then that all the estate above devised to her shall vest in her brother, Charles M. Armstrong, and sister, Margaret Salter, and their heirs, to be equally divided between them, share and share alike.

2. Held, that E. R. A. took an estate in fee simple in the lands, and an absolute property in the personal estate; that the words, "without heirs and intestate," imply a power of disposition, and are inconsistent with, and avoid the limitation over. By the Supreme Court.

The bill, filed July 14th, 1841, states that Mrs. Margaret Armstrong, late of Elizabethtown, being possessed, as her sole and separate property, free from the control of her husband, Col. William Armstrong, of a certain house, lot and garden in Elizabethtown, which she had purchased of one Andrew Woodruff, and which had been conveyed to Peter Kean, since deceased, in trust for her and her heirs, and also possessed of considerable personal estate, consisting of household goods and furniture, stocks in banks and insurance companies, money, and securities for money, and other effects, and of other real and personal estate, and having full power to dispose of the same by will, duly made and published her will, dated September 16th, 1827, executed and attested in such manner as to pass real estate; and thereby, after giving her plate to be equally divided among her four children, gave and devised as follows: "Item, I give and bequeath the house and lot which I purchased from Andrew Woodruff, situate in Elizabethtown, and which was conveyed by said Woodruff to Peter Kean in trust for me and my heirs, to my beloved husband, William Armstrong, for and during the full and complete term of his natural life, to be used and occupied by him as a residence, together with the use of all the household furniture (plate excepted) now therein contained; but if my said husband should marry, remove to foreign parts, or elect to break up housekeeping, then my will is that the above devise to him

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shall become null and void, and that the said house and lot, together with all and singular the household furniture therein, shall become the absolute property of my beloved daughter Eliza Rosetta Armstrong, to be taken and held by her under the like restrictions, limitations and conditions as the property hereinafter bequeathed to her. Item, I give and bequeath to my husband, William Armstrong, to my sons Edward Armstrong and Charles Armstrong, and to my daughter Margaret Salter, a gold ring, to be set with my hair, which rings shall be procured by my executor and executrix hereinafter named, as a slight token of my sincere and lasting affection ; and, while I invoke the blessing of Almighty God upon my aforesaid husband and children, I beg the last to believe that it is a subject of most deep-felt regret to a parent that has ever loved them and watched over them with the fondest affection, that she has it not in her power to provide more amply for them. But, as it has pleased God to place two of them, that is to say, my son Edward and my daughter Margaret, in easy circumstances, and as my beloved son Charles has both the disposition and the ability to provide a decent and respectable maintenance for himself, in his profession, I trust they will all cheerfully acquiesce in this, my last will. Item, I give and bequeath all the rest and residue of my estate in the State of New York and New Jersey, or wherever else situate, whether real, personal, or mixed, together with the reversion and remainder of the house and lot, together with my household furniture heretofore bequeathed to my husband, William Armstrong, during his natural life, or so long as he shall remain unmarried and elect to occupy the same as a residence, to my beloved daughter Eliza Rosetta Armstrong, to be by her possessed, enjoyed, and occupied, to her and her heirs forever, provided, nevertheless, that she shall and do, out of the rents, issues, and profits of the said estate, provide a decent and comfortable maintenance for my faithful and affectionate domestic, Catharine Small, whose long and affectionate services merit and receive my warmest gratitude. But if my said daughter Eliza Rosetta should die without heirs and intestate, then my will is, that all my estate herein above devised to her, shall vest in my son Charles M. Armstrong and my daughter Margaret Salter and their heirs, to be

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divided between them, share and share alike." And that the said testatrix thereby nominated and appointed her said son Edward Armstrong and her daughter Eliza Rosetta Armstrong, executor and executrix of her said will.

That said testatrix died on the 25th of September, 1827, leaving her said husband and her said four children therein named, surviving her. And that the said Edward and Rosetta, or one of them, proved the said will, and assumed the burden of the execution thereof.

That, after the death of the said testatrix, her said husband continued to reside in the said dwelling-house, and to use and occupy the said house and lot, with all the household furniture, except plate, until his death, which occurred on the 26th of January, 1830. That the said Eliza, after the death of the testatrix, continued to reside in the said house with her said father, until his death, and, immediately after his death, she took possession of the said house and lot, and all the household furniture therein, by virtue of her said mother's will and the said devise and bequest to her therein, and received the rents, issues, and profits thereof; and that the said Eliza sold and disposed of the said household furniture and other personal property of said testatrix, and converted the same, or the most of it, into money, and placed out the moneys arising therefrom, at interest, or purchased stocks therewith, or otherwise invested the same.

That, after the death of her father, the said Eliza, under the erroneous impression, as the complainants believe, that the said Eliza was indefeasibly seized, in fee simple, of the said house and lot, and had full power and authority so to do, undertook to sell and convey the said house and lot to her said brother, Edward Armstrong, as the complainants have been informed and believe, for about the consideration of \$—, and which said sum was placed out at interest, or stocks purchased therewith, and has been kept out at interest, or otherwise invested, ever since that time, by her, or by her trustee hereinafter named.

That, shortly after the execution of the conveyance by the said Eliza, for the said house and lot, a marriage being intended to be had and solemnized between Andrew C. Armstrong, Esq., of New Orleans, and the said Eliza, a certain indenture or mar-

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riage contract or settlement was duly made and executed, dated November 5th, 1838, between the said Eliza, party of the first part; the said Andrew C. Armstrong, of the second part, and William Kent, Esq., of the city of New York, of the third part, reciting that the said Eliza was possessed of and entitled to certain personal estate, viz., a certain bond of Samuel B. Ruggles, for \$2000, with an accompanying mortgage, said bond bearing date November 1st, 1836, and a bond of Thomas A. Emmett, dated December 1st, 1835, secured by a mortgage, for \$1400; also to five shares of the capital stock of the Manhattan Co.; also to twelve shares of the capital stock of the president, directors, and company of the State Bank at Elizabeth; also two shares of the capital stock of the New York Insurance Co; and that a marriage was intended, &c.; and that it was agreed that all the personal property of the said Eliza should be settled as therein provided, by which said indenture, the said Eliza, for the consideration therein mentioned, and with the approbation of the said Andrew, testified by his being a party thereto, granted, bargained, sold, assigned, &c., unto the said William Kent, all and singular the property before mentioned, and all other personal property of the said Eliza, of every kind and description, in trust for the said Eliza, until the said marriage, and from and after the solemnization thereof, to collect and re-invest the same at his discretion, and to vary and transpose the securities therefor as he might think expedient, and, during the joint lives of the said Eliza and Andrew, to hold, convey, and transfer the said property, and pay and apply the interest, dividends, and income thereof to such person and persons, and for such purposes as the said Eliza should, from time to time, notwithstanding her coverture, by any writing under her hand, direct or appoint, and, in default of such appointment, to apply and pay such interest, dividends, and income into the hands of the said Eliza, for her sole and separate use and benefit, independent of her said intended husband, and without being subject to his debts or control, and, from and after the death of the said Andrew, if the said Eliza should survive him, to convey said property and pay all the interest and income thereof to the said Eliza, absolutely, and free from all trusts. But if the said Eliza should die before the

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said Andrew, then to convey such property to such person or persons as the said Eliza should, by her will or deed, executed in the presence of two or more witnesses, direct and appoint; and in default of such appointment, in trust for the said Andrew, during his natural life, and on his death to hold the said property for, or to convey the same to, such person or persons as, at the time of the death of the said Eliza, should be, according to the laws of the State of New York, her next of kin.

That the property so conveyed by the said Eliza to the said Wm. Kent, Esq., in trust as aforesaid, is the same property, or the avails thereof, which was so given and devised by the testatrix to the said Eliza, and to the complainants Charles and Margaret, if the said Eliza should die without issue and intestate, including the proceeds of the sale of the said personal property, and of the said house and lot.

That the marriage between the said Andrew and the said Eliza was solemnized and had soon after the execution of the said marriage settlement; and that the said William Kent took, or received into his possession, all and singular the said trust property so conveyed to him in trust as aforesaid, and has ever since received the interest, profits and income thereof.

That the said Eliza died November 27th, 1839, without heirs of her body, or issue, intestate; and that, thereupon, the limitation over to the complainants Charles and Margaret, in the will of their said mother, took effect, and they became entitled, as tenants in common, to all the estate and property in and by the said will devised and given to the said Eliza, as aforesaid, as the same, in and by the said will, is given and devised to the said complainants and their heirs, to be equally divided between them in the event which has happened, the said Eliza having died without heirs of her body, and intestate.

That the said Edward Armstrong, after the said conveyance of the said house and premises by the said Eliza to him, but at which particular time the complainants know not, sold and conveyed the same to one James Nuttman, who is now in possession thereof under his said pretended purchase.

That the said Peter Kean, to whom and to whose heirs the said house and lot were conveyed as aforesaid, died in the year

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1828, leaving John Kean, Julia Kean, now the wife of Hamilton Fish, and Christine, his children and heirs-at-law ; and that, on the death of the said Peter Kean, the legal estate in the said house and lot, so held by him in trust as aforesaid, descended to the said John, Julia and Christine, as his heirs-at-law, who thereby became trustees of the said premises for the said Margaret Armstrong, during her life, and after her death, in trust for the complainants Charles and Margaret ; and that the legal title to the said premises is now vested in the said John, Julia and Christine, for the complainants Charles and Margaret. That the said Christine is a minor, and therefore cannot join the other heirs-at-law in conveying the legal title of the said house and lot to the complainants Charles and Margaret, without the direction of a court of equity ; and that the said John Kean, Hamilton Fish, and Julia, his wife, and Christine Kean, decline to act in the said trust, and refuse to assert the rights of the complainants Charles and Margaret to the said house and lot, by bringing an action of trespass and ejectment to recover the possession thereof, or to join the complainants in this suit.

That by a marriage contract made by and between the complainant Margaret and the complainant William L. Salter, before their intermarriage, dated July 26th, 1824, all the property therein mentioned as belonging to the complainant Margaret was conveyed to the said Peter Kean, in trust for the complainant Margaret, as therein mentioned ; and all the property which she might or should acquire was thereby secured to her for her sole and separate use ; and by the said marriage contract it was further agreed and provided that, in case the said Peter Kean should die during the said coverture, the said Margaret might choose any other person as trustee, to manage the said trust property according to the terms of the said trust, free from any control of the complainant William L. Salter. And that, after the death of the said Peter Kean, to wit, on or about November 29th, 1830, the complainant Margaret did, by a writing under her hand and seal, of that date, choose and appoint the complainant George Elliott as her trustee, in the place of the said Peter Kean, deceased.

The bill prays that the equitable rights of the complainants

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Charles and Margaret under the will of their said mother may be ascertained and finally decided, and that the rights of the said complainants to the said house and lot may be established, and the sale and conveyance thereof by the said Eliza set aside or declared null and void, and that the said John Kean, Hamilton Fish, and Julia, his wife, and Christine Keen, may be decreed to convey the legal title to the said house and premises to the complainants Charles and Margaret, and that the possession of the said house and premises may be delivered to them, and that an account may be decreed and directed to be taken of the rents and profits thereof since the death of the said Eliza, to be paid to the complainants Charles and Margaret, by the defendants, or some or one of them; and that an account may be taken by and under the decree and direction of the court, of all the rest and residue of the estate of the said testatrix, except the plate and specific legacies, which is given to the complainants Charles and Margaret, in the event, which has happened, of the death of the said Eliza without heirs of her body, and intestate, and of the sales and investments thereof, and of the part or amount thereof granted, assigned, and transferred to the said William Kent, in trust as aforesaid, by the said marriage agreement, and of the investments made thereof by him, and of what he has received for the interest, dividends, and income thereof since the death of the said Eliza, and that he may be decreed to pay or deliver the same to the complainant Charles, and the complainant Margaret, or her said trustee; and for further relief.

William Kent put in his several answer.

He admits the will. He says that on or about the 1st of April, 1830, Eliza sold and conveyed the house and lot to one Andrew Thompson, in fee simple, for \$2500. That the same was afterwards sold and conveyed to Edward Armstrong, by auditors appointed by the Court of Common Pleas of the borough of Elizabeth under an attachment issued out of that court against the said Thompson as a non-resident debtor. That he has no knowledge, information, or belief that the said Eliza ever undertook to sell and convey the said house and lot to the said Edward Armstrong. That it may be true that the said Eliza also sold and disposed of the household furniture and other personal

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property given to her by the said will, and placed at interest or invested in stocks, the moneys arising therefrom and from the sale of the said real estate, but that he has no such knowledge or information thereof as will enable him explicitly to admit or deny the same.

He admits the ante-nuptial contract between Eliza and Andrew C. Armstrong and himself, as trustee, and that he took or received into his possession or control all the property therein mentioned and thereby conveyed to him in trust; and that he has ever since received the interest, dividends, and profits thereof, and paid and applied the same, and every part thereof which accrued during the life of the said Eliza, to such persons and for such purposes as she, by writing under her hand, directed and appointed, or into her hands for her sole and separate use; and since the death of the said Eliza has paid over the same, or the greater part thereof, to the said Andrew C. Armstrong, her surviving husband, as by the said marriage contract he was directed and required to do. That it may be true that the said property so conveyed, assigned, and transferred to him by the said marriage contract, in trust aforesaid, is the same property, or the avails thereof, which was given and devised by the said Margaret Armstrong to the said Eliza, by her said will, including the proceeds of the sale of the said personal property and of the said house and lot, but that he has no such knowledge, information or belief thereof as will enable him more explicitly or positively to confess or deny the same.

He admits the death of Eliza, on the 29th of November, 1839, without heirs of her body, and intestate, and that her husband, the said Andrew, survived and still survives her, but whether, on her death and during the life of said Andrew, the said Charles M. Armstrong and Margeret Salter, under the will of the said Margaret Armstrong, became entitled to the property and estate assigned, transferred, and conveyed to him as aforesaid; or whether, inasmuch as the said Eliza did not make any will or deed directing or appointing to whom this defendant should convey the said property, this defendant is bound, by virtue of the said marriage contract, to hold the said property to and for the use of the said Andrew during his life, is a question of law which

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he submits to the decision of the court, declaring himself to be ready and willing to perform such order and decree in the premises as the court shall adjudge to be equitable and just.

He admits the sale and conveyance of the house and lot by Edward Armstrong to James Nuttman, and that Nuttman is in possession.

He admits the death of Peter Kean, leaving the children and heirs-at-law mentioned in the bill, one of whom, Christine, is a minor.

He says that after the decease of the testatrix, Margaret Armstrong, and in August, 1828, the said Margaret Salter and Charles M. Armstrong, and Edward Armstrong, their brother, executed, under their hands and seals, and delivered to the said Eliza R. Armstrong, a deed poll, which was prepared and designed to be executed also by the said William Armstrong, Sarah, the wife of the said Edward Armstrong, and the said William L. Salter, neither of whom, in fact, ever signed or sealed the same, in and by which said deed the said Margaret Salter, Charles and Edward Armstrong, after reciting, among other things, that the said Margaret Armstrong, the testatrix, made her will, by which, after certain legacies and bequests to persons therein named, and a devise to William Armstrong, during his natural life, of a certain house and lot therein named, on certain conditions, the rest and residue of said estate is given, bequeathed and devised to the said Eliza R. Armstrong, absolutely and to her heirs forever, as by reference to said will would appear, did, jointly and each of them individually, confirm, establish, ratify and make good the said will and all the provisions thereof; and did also, in consideration of the premises therein recited, and of \$1 to them and each of them paid by the said Eliza, assign, transfer, quit claim and set over to the said Eliza, her heirs, executors, administrators and assigns, absolutely and forever, all their right, title, interest, property, estate, claim and demand of, in, to or concerning the estate, real and personal, in possession, reversion, remainder or expectancy, of which the said Margaret Armstrong, during her life, was at any time seized or possessed, interested in or entitled to, (excepting always such property as in and by the will of the said Margaret Arm-

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strong, they or either of them by any legacy or devise were entitled to,) to have and to hold the same unto her the said Eliza, her heirs, executors, administrators and assigns, absolutely and forever.

He admits that Andrew C. Armstrong claims to be entitled, by virtue of the said marriage agreement, to the interest, dividends and income of all the said trust property, during his natural life; and that he, this defendant, in conformity to the trusts upon which the said property was assigned and conveyed to him, and in the honest belief that he was, both in law and in good conscience, authorized and bound so to do, in October, 1840, paid over to the said Andrew, of the interest, dividends and income which have accrued from the said trust property since the death of the said Eliza, the sum of \$306.40.

Evidence was taken on the part of the complainants, by which it appeared that Eliza R. Armstrong had no property, except what she derived from her mother's will.

I. W. Scudder, for the complainants. He cited 4 *Kent's Com.* 533; 7 *Bac. Ab.* 341; 1 *Harr. N. J. Rep.* 26; *Pow. on Dev.* 373; 4 *Term Rep.* 294; 2 *Wm. Bl.* 1010, 889; 2 *Halst. Rep.* 379; 6 *Cruise's Dig.* 148, 404, 5; 2 *Bl. Com.* 172, 3; *Cro. Jac.* 590; 4 *Wend.* 278; 11 *Johns. Rep.* 338; 1 *Ib.* 444, 9; 10 *Ib.* 382; 20 *Ib.* 483; 2 *Cowen* 333; 6 *Ib.* 180; 6 *Johns. Rep.* 185; 5 *East* 501; 7 *Cranch* 456; 3 *Halst. Rep.* 29; 2 *Mass. Rep.* 57; *Saxton* 315; 11 *Pick.* 503; *Doug.* 759; 8 *Term Rep.* 54, 65; *Cowper* 657; 2 *Atk.* 241; 8 *Cow.* 277; 15 *Serg. and Rawle* 190; 5 *Johns. Ch.* 346; 1 *Gallison* 458.

W. Pennington, *contra*. He cited 4 *Kent's Com.* 264, 275; *Fitzherb.* 314; 1 *Jac. and Walk.* 154; 5 *Mass. Rep.* 500; 10 *Johns. Rep.* 19; 15 *Ib.* 169; 16 *Ib.* 537; 7 *Term Rep.* 276; 4 *Ib.* 605; 2 *Bl. Com.* 398; *Lovel. on Wills* 256; *Ward on Leg.* 236; *Fearn. Ex. Dev.* 167; 3 *Meriv.* 176; 5 *John. Rep.* 346; 2 *Green's Rep.* 174.

THE CHANCELLOR. Mrs. Margaret Armstrong, being pos-

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sessed as her sole and separate property, free from the control of her husband, Col. William Armstrong, of a house and lot in Elizabethtown which she had purchased, and which had been conveyed to Peter Kean, since deceased, in trust for her and her heirs, and being also possessed of considerable personal estate, and of other real estate, and having full power to dispose of the same by will, made her will, dated September 16th, 1827, and thereby, after giving her plate to be equally divided among her four children, gave and devised as follows: "Item, I give and bequeath the house and lot in Elizabethtown, which I purchased, &c., and which was conveyed to Peter Kean in trust for me and my heirs, to my beloved husband, William Armstrong, during the full end and term of his natural life, to be used and occupied by him as a residence, together with the use of all the household furniture, (plate excepted,) now therein contained; but if my said husband should marry, remove to foreign parts, or elect to break up housekeeping, then my will is that the above devise to him shall become null and void, and that the said house and lot, together with all and singular the household furniture therein, shall become the absolute property of my beloved daughter, Eliza Rosetta Armstrong, to be taken and held by her under the like restrictions, limitations and conditions as the property hereinafter bequeathed to her." She then gives to her husband, and to her sons Edward and Charles, and to her married daughter, Margaret Salter, gold rings, to be procured by her executor and executrix. She then expresses her regret that she has it not in her power to provide more amply for her children, but says that it has pleased God to place two of them, Edward and Margaret, in easy circumstances, and as her beloved son Charles has both the disposition and the ability to provide a decent and respectable maintenance for himself, in his profession, she trusts they will all cheerfully acquiesce in her will. The will then proceeds as follows: "Item, I give and bequeath all the rest and residue of my estate in the States of New York and New Jersey, or wherever else situate, whether real, personal or mixed, together with the reversion and remainder of the house and lot, together with my household furniture heretofore bequeathed to my husband during his natural life, or so long as he shall remain unmarried and elect to oc-

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cupy the same as a residence, to my beloved daughter Eliza Rosetta Armstrong, to be by her possessed, enjoyed and occupied, to her and her heirs forever, provided, nevertheless, that she shall and do, out of the rents, issues and profits of the said estate, provide a comfortable maintenance for my faithful domestic, Catharine Small. But if my said daughter Eliza should die without heirs and intestate, then my will is that all my estate herein above devised to her shall vest in my son, Charles M. Armstrong, and my daughter, Margaret Salter, and their heirs, to be divided between them, share and share alike." The will then appoints her son Edward and her daughter Eliza executor and executrix thereof.

The testatrix died September 25th, 1827, leaving her said husband and said four children surviving her. The husband continued to reside in the said dwelling-house, and to use and occupy the said house and lot, and the household furniture, (except the plate.) Eliza continued to live with her father until his death, on the 26th January, 1830. Immediately after his death, Eliza took possession of the house and lot and the household furniture. She sold the household furniture and other personal property of the testatrix, and converted it, or the most of it, into money, and placed the moneys arising therefrom at interest, or purchased stocks therewith, or otherwise invested the same, and conveyed the said house and lot for the consideration of \$——, which sum was placed at interest, or invested in stocks, or otherwise, and has been kept at interest or otherwise invested ever since by her trustee hereinafter named.

Shortly after the execution of the conveyance by the said Eliza of the said house and lot, an ante-nuptial contract was made between the said Eliza and her intended husband, Andrew C. Armstrong, and William Kent, party thereto of the third part, reciting that the said Eliza was possessed of and entitled to certain personal estate, viz., a bond and mortgage for \$2000, (describing them,) dated November 1st, 1836; a bond and mortgage for \$1400, (describing them,) dated December 1st, 1835, and 17 shares of bank stock, (describing them,) and two shares of insurance stock, (describing them,) and that a marriage was intended, &c., and that it was agreed that all the personal property of the said Eliza should be settled as therein provided; and conveying

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the said personal property mentioned in the said marriage articles, and all other personal property of the said Eliza, to William Kent, in trust for the said Eliza until the said marriage, and after the marriage to collect and re-invest the same; and during the joint lives of the said Eliza and Andrew to hold, convey, and transfer the said property, and pay and apply the interest, dividends, and income thereof to such persons and for such purposes as the said Eliza should, from time to time, notwithstanding her coverture, by any writing under her hand direct or appoint; and, in default of such appointment, to apply and pay such interest, dividends, and income into the hands of the said Eliza, for her sole and separate use and benefit, independent of her said intended husband, and without being subject to his debts or control; and, from and after the death of the said Andrew, if the said Eliza should survive him, to convey said property, and pay all the interest and income thereof to the said Eliza, absolutely, and free from all trusts. But if the said Eliza should die before the said Andrew, then to convey such property to such person or persons as she should by will or deed, executed in the presence of two or more witnesses, direct and appoint; and in default of such appointment, in trust for the said Andrew, during his natural life, and on his death to hold the said property for, or to convey the same to such person or persons as, at the time of the death of the said Eliza, should be, according to the laws of the State of New York, the next of kin.

The marriage took place, and the trustee, William Kent, received the property mentioned in the marriage settlement.

Eliza R. Armstrong died November 27th, 1839, without issue, and intestate.

The bill prays that the equitable rights of the complainants Charles M. Armstrong and Margaret Salter, under the will of their said mother, be ascertained and finally settled; that the rights of the said complainants to the said house and lot may be established, and that the sale thereof by the said Eliza may be set aside or declared void; and that the heirs of Peter Kean, deceased, (made parties defendants,) may convey the legal title to the said house and lot to the complainants Charles and Margaret, and that the possession of the said house and premises be

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delivered to them ; and that an account may be directed to be taken of the rents and profits thereof since the death of the said Eliza, and that they may be paid to the complainants Charles and Margaret, and that an account may be decreed to be taken of all the rest and residue of the estate of the said testatrix, which is given by the said will to the complainants Charles and Margaret, in the event of the death of the said Eliza "without heirs and intestate," and of the sales and investments thereof, and of the part or amount thereof transferred to the said William Kent, in trust as aforesaid, by the said marriage articles, and of the investments made thereof by him, and of what he has received for the interest, dividends and income thereof, since the death of the said Eliza, and that he may be decreed to pay or deliver the same to the complainants Charles and Margaret.

Andrew C. Armstrong, William Kent, James Nutman, (who claims the house and lot by mesne conveyance thereof from Eliza's grantee thereof,) and the heirs of Peter Kean, deceased, are made defendants.

Assuming that the bonds and mortgages, stocks, and personal property conveyed by the said marriage settlement to W. Kent, in trust, as therein stated, are the proceeds of the property devised and bequeathed by the will of Margaret Armstrong to Eliza R. Armstrong, in the manner in the said will provided, with the limitation over as also therein provided, the questions presented for consideration are the same as would be presented to a court of law under a will made by one having the legal estate in this real and personal property devising and bequeathing to Eliza R. Armstrong in the manner provided by this will, with the limitation over therein provided.

It is a devise of all the rest and residue of the estate, real, personal, or mixed, to Eliza R. Armstrong, to be by her possessed, enjoyed, and occupied, to her and her heirs forever ; but if she should die without heirs and intestate, then that all the estate above devised to her shall vest in her brother Charles M. Armstrong and sister Margaret Salter and their heirs; to be divided between them, share and share alike.

The questions presented are—

1st. Whether these clauses, taken together, and by force of

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the words "and intestate," do or do not give to Eliza a fee simple in the lands, and an absolute property in the personal estate, or if not a fee simple in the lands, an absolute property in the personal estate.

2d. If, by force of the words "and intestate," neither a fee simple in the lands, nor an absolute property in the personal estate is given, what estate is given to Eliza in the lands? Is it a fee tail in Eliza, with a contingent remainder over to Charles and Margaret, or is the limitation over to Charles and Margaret an executory devise? In other words, are the words "without heirs," or the words "without heirs and intestate," to be construed to mean an indefinite failure of issue, or only a failure of issue at the time of Eliza's death?

3d. If the will be construed to give Eliza an estate tail in the lands, what estate or interest had she in the personal property?

4th. If the limitation over be construed to be an executory devise, is (such) a limitation over of personal property on one's dying without heirs and intestate within the rules of law?

5th. What was the effect in law of the deed from Margaret Salter, Charles M. Armstrong and Edward Armstrong, to Eliza Rosetta Armstrong, referred to in the pleadings, and how does it affect the trust to William Kent?

These I conceive to be questions involving rules of property that should be settled by the law courts, and I shall accordingly direct a case to be made for the opinion of the Supreme Court thereon.

The case was argued before the Supreme Court, and the following is a copy of the opinion certified by the Supreme Court to the Chancellor:

NEW JERSEY SUPREME COURT.

OCTOBER TERM, 1848.

Between

CHARLES M. ARMSTRONG, WILLIAM D.
SALTER, and MARGARET, his wife,
and GEO. T. ELLIOTT, complainants,
and

ANDREW C. ARMSTRONG, WM. KENT,
JAMES NUTMAN, JOHN KEAN, HAM-
ILTON FISH, and JULIA, his wife, and
CHRISTINE KEAN, defendants.

On a case submitted by the Chancellor to the Supreme Court.

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I, Henry W. Green, Chief Justice of the Supreme Court, do certify to his Honor, Oliver S. Halsted, Chancellor of the State of New Jersey, that the questions submitted in the above cause came on to be heard before the justices of the Supreme Court, at the July Term of said court, in the presence of the Chief Justice and Justices Nevius and Carpenter, and were then debated by the counsel of the respective parties, and the court took time to consider the same until the present October Term of said court, and I report, as the unanimous opinion of the said court, that Margaret Armstrong, by the will in the said case mentioned, in the residuary clause thereof, devised to her daughter, Eliza Rosetta Armstrong, an estate in fee simple in the lands, and bequeathed to her an absolute property in the personal estate therein devised and bequeathed to her; that the words "without heirs and intestate," in that clause, imply a power of disposition, and is inconsistent with and avoids the limitation over; that so far as the said lands and personal estate were embraced in the property conveyed to William Kent, the same passed under the trusts expressed in the marriage article referred to in the said case. And I further report, as the opinion of the said court, that the deed referred to did not, in the view taken of the case by the court, affect the trust in William Kent.

Dated 10th February, 1849.

HENRY W. GREEN.

The opinion of the Supreme Court will be found at length in *Zabriskie's Rep.* 518.

A decree was signed by the Chancellor accordingly.

REVERSED, 2 *Hal. Ch.* 637.

Van Mater v. Holmes.

JOSEPH H. VAN MATER, JR., v. DANIEL HOLMES.

1. The bill stated that in January, 1842, H. V. and J. V., in consideration of \$10,000, conveyed to the complainant a farm; that the agreement for the sale had been concluded some days prior to the execution of the deed; that the deed was recorded a few days after its delivery. That at the delivery of the deed the complainant was ignorant of the existence of a judgment in favor of the defendant in the bill against the said H. V. and J. V., or that the defendant held a judgment bond against them. That the object of H. V. and J. V. in selling said farm, was to raise money to pay their creditors, of whom the defendant was one, and that the said money was duly applied in the payment of their debts. That during the negotiation for the said purchase by the complainant, the defendant was acquainted with the whole matter, and was told by H. V. of the intended sale to the complainant, and advised the making thereof, and knew that the complainant was buying the property supposing it to be clear of any judgment in his favor, but that the defendant, after said agreement of purchase and sale had been made, and on the 19th of January, 1842, had a judgment entered up on a judgment bond he held against said H. V. and J. V. That the said H. V. and J. V. had ample real estate remaining in them after the said sale to satisfy the defendant's judgment, but that he released the same, or large portions thereof, from the lien of said judgment. That the defendant, before the said sale, held two judgments against the said H. V. and J. V., which had been assigned to him, and that on the 7th December, 1842, they transferred to him a draft for \$6000, drawn upon and accepted by certain persons in Kentucky, as collateral security for the payment of his said two last-mentioned judgments, amounting to about \$5000, the defendant agreeing, under hand and seal, to apply what he should receive on the said draft, first, to the payment of his said two last-mentioned judgments, and to account for the surplus. That the defendant received on said draft \$5287.52, and did not apply the same on his said two judgments, but raised the amount of said judgments by sales on execution, and now insists on appropriating said money to judgments entered since the said deed to the complainant, and which the defendant holds against the said H. V. and J. V., leaving older judgments unpaid, and thereby charging the complainant's farm with the amount thereof. And that the defendant has caused an execution issued on his said judgment of January 19th, 1842, to be levied upon the complainant's said farm. The bill prayed relief, and an injunction restraining sale on the last-mentioned execution. The injunction was allowed.

2. An answer was put in, and a motion thereupon made to dissolve the injunction. The injunction was retained until the hearing.

On the 10th of April, 1845, Joseph H. Van Mater, Jr., exhibited his bill, stating that in January, 1842, Holmes Van Mater, his father, and Joseph H. Van Mater, his uncle, in consideration of \$10,000, sold and conveyed to him a valuable

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farm in Middletown, Monmouth county. That the agreement for sale had been concluded some days prior to the execution and delivery of the deed. That very shortly after the delivery of the deed, to wit, on the 22d of January, 1842, it was recorded in the clerk's office of Monmouth. That at the time of the negotiation for the purchase of said farm, as well as at the time of the delivery of the deed therefor, he was ignorant of the existence of the judgment in favor of the defendant, Daniel Holmes, for \$19,427.36, to secure the sum of \$——, or of any other judgment of like character, and he was likewise ignorant that he held a judgment bond therefor. That he was confident the estate of the said Joseph H. and Holmes Van Mater was amply sufficient to pay all judgments then had and entered against them. That thereupon he purchased said farm at a full and fair price, and accepted a deed therefor, with warranty against all encumbrances. That the object of the sale of said farm was to raise money for the creditors of the said Joseph H. and Holmes Van Mater, of whom the defendant was one, and the complainant charges that the said money was duly applied in payment of debts of the said Joseph H. and Holmes Van Mater.

The bill states that during the time of the negotiation for the purchase of the said property by the complainant, the defendant was acquainted with the whole matter; that the defendant is the brother-in-law of the said Joseph H. and Holmes Van Mater, and the uncle of the complainant; that he lived near the complainant, frequently saw and talked with him, and had every opportunity of informing the complainant of his judgment, or of his intention to obtain a judgment, before the delivery of the deed to the complainant. That the defendant was told by the said Holmes Van Mater, the complainant's father, of the intended sale to the complainant, the price, &c., and advised and counseled the sale being made. That he well knew the complainant was buying said property clear, as complainant supposed, of any such judgment as he now claims against it. That, notwithstanding all this, after the agreement to purchase had been made, and he knew it, as complainant charges, and nothing remained but the execution and delivery of the deed, the defendant, as the complainant believes, went to New Brunswick and had a judg-

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ment signed, on the 19th of January, 1842, before a justice of the Supreme Court, for \$19,429.36 debt, and \$4 costs, and forthwith sent the record to the clerk's office of the Supreme Court at Trenton, where it was filed, on the 20th of the same month; and the complainant submits that, under these circumstances, the said judgment is not a lien prior to the complainant's deed; that the defendant was bound, in equity, to apprise the complainant of his intended action on his judgment bond, the same bearing date August 31st, 1841, or of the judgment itself, after the same was signed; and that his failure to do so—his standing by, advising the sale, and seeing the complainant purchase without notifying him of any claim or encumbrance, and knowing, too, the embarrassments of the said Joseph H. and Holmes Van Mater, and the little security their covenants would give to the purchaser—was a fraud in equity which avoids his judgment as against the complainant.

That, subsequent to the said conveyance to the complainant, the said Joseph H. and Holmes Van Mater were yet the owners of a very large and valuable real estate in said county; that the defendant's said judgment was a lien on the said remaining real estate—all which, in equity, must have been first sold to pay said judgment, before the defendant could fall back on the farm, which had been before sold to the complainant.

The bill charges that there was ample real estate remaining, after the sale to the complainant, to have satisfied the said judgment, but that the defendant, without the assent of the complainant, released and discharged said real estate, or large portions thereof, and, more particularly, he released and discharged from his said judgment, a farm situate in said county, sold and conveyed to one —. Cook, for \$13,000, or thereabouts; and the complainant submits that the defendant cannot thus interfere with and destroy the rights and equities of the complainant, and that, by his act aforesaid, he has released and discharged the farm of the complainant from his said judgment, if the same ever was a lien thereon.

That the defendant held two judgments against the said Joseph H. and Holmes Van Mater, which had been assigned to him, one in favor of Elisha Laird, for \$—, or thereabouts, and one

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in favor of —. Hendrickson, for \$—, or thereabouts.

That on the 7th of December, 1842, a draft drawn by Joseph H. Van Mater, endorsed by Holmes Van Mater, upon certain persons in Kentucky, and by them accepted, for \$6000, was assigned to the defendant, as collateral security, to pay him the two judgments last mentioned, amounting, together, to about \$5000; and the defendant, at the time of the assignment and accompanying the same, promised and agreed, by writing under his hand and seal, that he would, on the receipt of the balance due on said bill of exchange or draft, apply the proceeds, in the first place, to the payment of the said Laird judgment, and, secondly, to the payment of the said Hendrickson judgment, and, if more than enough for those purposes, he was to account for the surplus. That the defendant received on said draft, \$5287.52, as the complainant is informed and believes, and has neglected and refused to apply the said money on the said two judgments, but raised the amount of said judgments by sales on execution, and now, as the complainant is informed, insists on his right to appropriate said money to judgments entered since the said deed to the complainants, and which he holds against the said Joseph H. and Holmes Van Mater, leaving an older judgment, or older judgments, unpaid, and thereby reaching back of the complainant's said deed, and charging his said farm with the amount thereof.

The bill states that the complainant is informed and believes, that divers other large sums of money—more particularly \$700, or thereabouts—received on a note, given by one —. Cook to said Joseph H. and Holmes Van Mater, and placed in the hands of the defendant for collection, have never been accounted for by the defendant, nor specifically appropriated by any one to the payment of any particular debt—which said sums, the complainant insists, the law will now apply to the said oldest judgment, in favor of the defendant, and thereby relieve the complainant's farm of that amount of burden, if the said judgment be an encumbrance at all thereon.

That at the time of the said sale to the complainant, the said Joseph H. and Holmes Van Mater were much embarrassed, and that they have been since sold out at sheriff's sales, by virtue of

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sundry executions in favor of the defendant and others; and that they are now wholly without means to respond to the complainant on their said covenants of warranty in their said deed to him; and that if the farm in question be sold under execution, the complainant will be entirely without remedy.

That the defendant has had an execution issued on his judgment of January 19th, 1842, and levied on the complainant's farm.

The bill prays that the said judgment may be declared not to be a lien or encumbrance on the said farm of the complainant, or if the court shall think it is an encumbrance, then that an account be taken of all moneys received by the defendant, as before mentioned, and that the same may be credited on the judgments first entered; or if the court shall think this cannot be now done, they having been paid and satisfied, then that the credit be put upon the oldest unsatisfied judgment; and that the complainant may have the benefit of the doctrine of substitution in those cases where the defendant has had the option of two funds; and that a general account may be taken of all moneys which the defendant has received, or might have received but for his default upon his said judgment, and the complainant's farm held liable for the balance only; and that in the meantime, the defendant and the sheriff be restrained by injunction from proceeding to sell the said farm of the complainant on the said execution.

An injunction was granted according to the prayer of the bill.

The defendant put in his answer on the 7th of April, 1847. He says he has understood, and believes it to be true, that on the 21st or 22d of January, 1842, Joseph H. and Holmes Van Mater, in consideration of \$10,000, sold and conveyed to the complainant the farm in the bill mentioned, and that the deed therefor was recorded on the 22d of January, 1842; but says he is ignorant whether the said deed was actually delivered on the 21st or 22d of January, 1842.

He says he is ignorant whether or not the agreement, or any agreement for said farm had been concluded some days, or any other time, prior to the execution and delivery of said deed; but if there was any such agreement concluded prior to the execution and delivery of said deed, he says he was entirely ignorant

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that any such agreement had been concluded, except that he was told by Aaron Longstreet, a few days before he entered up his judgment, that Holmes Van Mater had agreed to let the complainant have said farm, but that Joseph Van Mater was not willing to enter into such agreement.

He says he does not know, of his own knowledge, whether or not the complainant, either at the time of the alleged negotiation for the purchase of said farm, or at the time of the delivery of the deed therefor, was entirely ignorant of this defendant's judgment for \$19,427.36; but he says that his judgment bond, upon which said judgment is entered, is dated and was delivered on the 31st of August, 1841; and that he left home on his way to Trenton, on the 17th or 18th of January, 1842, for the purpose of entering up said judgment; and he states that he believes and charges the truth to be, that the complainant, when this defendant so left home, well knew of the existence of the said judgment bond, and that this defendant left home on his way to Trenton for the express purpose of entering up said judgment bond; and he further charges the truth to be, that the complainant, at and before he received his said deed, well knew that this defendant had gone for the purpose of entering up his said judgment bond, or that the complainant had been informed, or had reason to suspect that this defendant had gone to Trenton to enter judgment on his said bond and actually had done so.

He denies that the complainant, either at the time of the alleged negotiation, or at the time of the delivery of the deed, was ignorant that this defendant held the said judgment bond; but on the contrary, he says that at and prior to the date of the said judgment bond, the complainant was indebted to this defendant between \$1500 and \$1800, for goods and merchandise previously sold by this defendant to the complainant, for which this defendant held the joint note of the complainant and Holmes Van Mater, and which said debt of the complainant was, at the time of the giving of said judgment bond, at the urgent solicitation of the said Holmes Van Mater, incorporated in and made part of the consideration of the said judgment bond and said note of complainant and Holmes Van Mater, delivered up to said Holmes Van Mater and considered in the arrangement then made

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as so much cash ; all which was done, as this defendant expressly charges, with the knowledge and consent of the complainant ; and of all which, this defendant expressly charges and believes, the complainant had full knowledge from the time of the execution of said judgment bond until the actual entry of said judgment.

He says he is ignorant whether or not the complainant was, either at the time of the alleged negotiation or at the time of delivery of said deed, confident that the estate of said J. H. and H. Van Mater was amply sufficient to pay all judgments then held against them, or purchased said farm upon any such confidence ; but he admits the complainant gave a full, fair price for said farm, with full warranty against all encumbrances ; but he does not know that the price the complainant gave for it was beyond its actual value.

He says he is ignorant whether or not the object of said sale was to raise money for the creditors of said Joseph H. and Holmes Van Mater, but admits that he was and is one of their creditors, and denies that he ever, as one of said creditors, received any of the proceeds of said sale, and says he does not know, and does not believe, that said money was duly applied in payment of debts of said Joseph H. and Holmes Van Mater.

He denies that, during the time of said alleged negotiation, he was acquainted with the whole matter, further than what is stated in this answer ; but admits he is the brother-in-law of the said Joseph H. and Holmes Van Mater, and the uncle of complainant, and that he lived near the complainant, and frequently saw and talked with him ; but he denies that he had every or any opportunity of informing the complainant of the said judgment, previous to the delivery of the complainant's deed. On the contrary, he states that he did not return from Trenton, at the time of entering up said judgment, until the 22d or 23d of January, 1842, and which was after the delivery of the complainant's deed.

He admits that, from the date of his said judgment bond until he left home for Trenton, as aforesaid, to enter it up, he had every opportunity of informing the complainant of his intent to obtain judgment on his said bond, but he denies that he had any opportunity after he left home as aforesaid, before the delivery of

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the complainant's deed ; but he says that he made use of no means to conceal his intentions of entering up judgment on his said bond from the complainant ; but, on the contrary, he states and charges the truth to be, that the complainant well knew of his said judgment bond from its date, and had no reason to expect or believe that this defendant would delay entering judgment as long as he did.

He further states that several judgments had been obtained against the said Joseph H. and Holmes Van Mater since the date of his said bond, and others were prosecuting their claims to judgment ; and that he had expressly told Holmes Van Mater, several weeks before, that he intended to wait no longer, and meant to enter up his said judgment.

He states that at, and for a long time previous to, the 17th of January, 1842, the said Joseph H. and Holmes Van Mater were seized of several large tracts of land in Monmouth, (stating them,) and that the following mortgages had been put upon the same, and were then liens upon the same, viz. (stating them) ; that, besides said mortgages, there were legacies which were prior liens on three of said farms, (naming them,) due Mary Lloyd, of about \$4000. That besides said encumbrances, there were, at the same time, the following judgments against Joseph H. and Holmes Van Mater, (stating them,) which were liens on all their real estate. That John Crawford obtained judgment against Holmes Van Mater, in the Monmouth Circuit Court, on the 19th of October, 1841, for about \$270, and Garret Smock a judgment against said Holmes Van Mater, in the same court, on the same day, for about \$155 ; and that, on the 17th of January, 1842, there were several suits pending against the said Joseph H. and Holmes Van Mater, which would be ripe for judgment at the next terms of the Monmouth courts, which came on the 4th Tuesday of January and July, and in which judgments were in fact entered, in said terms, one in favor of Frederick Kingston, for about \$310, and one in favor of Elisha Laird, for about \$2000.

That on the 6th of April, 1842, he entered up, in the Court of Common Pleas of Monmouth, a judgment by confession, on another judgment bond given by said Joseph H. and Holmes

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Van Mater to him, for \$8106, real debt, \$4053, on a judgment bond dated April 5th, 1842, for other debts owing him.

That said Joseph H. and Holmes Van Mater gave a judgment bond on the 25th of January, 1842, to one Daniel Van Mater, and judgment was entered in the Monmouth Pleas on the same, on the 3d of February, 1842, for a real debt of \$2000, or thereabouts. That executions were issued on the above judgments which had been entered previous to this defendant's, and were in the hands of the sheriff to be executed ; and that the said Joseph H. and Holmes Van Mater were in the habit of advising with him as to their business ; and his advice to them was, generally, to sell their real estate as fast as they could to advantage, to clear off said encumbrances.

That the farm in the bill mentioned as having been sold to the complainant, at and prior to said 17th of January, 1842, belonged to one Aaron Longstreet, and that said Longstreet, on the said 17th of January, 1842, sold it to Joseph H. and Holmes Van Mater, for \$10,000, the deed for which was recorded on the 18th of January, 1842 ; and that the said Joseph H. and Holmes Van Mater paid for said farm by selling to said Longstreet, Garret Hiers, and Haddock Whitlock the said Middletown Point property at \$12,000, and the payments were arranged by paying the said Van Maters \$2000 in cash, and by transferring the said Crawford mortgage of \$4500 from the said Middletown Point property to the farm so sold by Longstreet to the said Van Maters.

He says he does not recollect that he was told by said Holmes Van Mater of the intended sale to the complainant, the price, &c. ; but he admits that he was aware of the said intended exchange with Longstreet, and which this defendant assented to on the express condition only that the said \$2000 should be appropriated to the then existing encumbrances ; and he thinks it possible that said Holmes Van Mater may have told him that, in case such exchange was effected, he intended to sell said farm to the complainant.

He says he has no recollection that he advised and counseled said sale to the complainant, but says that if he did so it was upon the express condition that the purchase money should be

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appropriated towards paying off the then existing encumbrances.

He says he never had any communication with the complainant with respect to said sale, and never advised or counseled him to buy it; and he charges the truth to be that the \$5500, the balance of the purchase money of said sale to complainant, after taking out the said Crawford mortgage, was never in any way appropriated to pay off said prior judgments and encumbrances.

He denies that he well knew, or that he had any suspicion that the complainant was buying said property, as he supposed, clear of this defendant's judgment; on the contrary, he believes and charges the truth to be, that the complainant, at the time he took his said deed, well knew that the defendant had left home for the purpose of entering up his said judgment bond, and that none of the purchase money was, in fact, paid at the delivery of the deed, and that the said Holmes Van Mater and the complainant hurried through the execution, delivery, and recording said deed, for the express purpose, if possible, of getting ahead of the judgment which they well knew this defendant was in the act of entering up, and that no part of the purchase money was paid until some time after this defendant's execution was put into the sheriff's hands, and was then paid, if it ever has in fact been paid, with the full knowledge of this defendant's judgment and execution, and was then paid, not because the complainant did not think this defendant's judgment was a lien as against him, but under the expectation that the balance of said property of Joseph H. and Holmes Van Mater would pay off all prior encumbrances, including this defendant's judgment.

He says he was ignorant, at the time he entered up his said judgment, that any agreement had been made by the complainant to purchase, and that nothing remained to be done but the execution and delivery of the deed to consummate the contract, except as hereinbefore stated; but he admits and charges that, becoming uneasy about his said debt, both on account of the manner in which the said Joseph H. and Holmes Van Mater were acting, and the pressing of other claims to judgment, after having given the said Holmes Van Mater notice that he should enter up his judgment on his said bond, he left home on the 17th or 18th of

January, 1842, for Trenton, for the purpose of entering up his judgment in the Supreme Court, to bind all the lands of the said Joseph H. and Holmes Van Mater in this state, and met, at Trenton, his counsel, James S. Green, who having drawn up the necessary papers, this defendant went to New Brunswick to find a Justice of the Supreme Court, where the said judgment was signed by Justice Nevius, with which this defendant returned to Trenton, and caused the same to be filed on the 19th or 20th of January, 1842, and then sent the execution to the sheriff, who received it on the 22d of said month; and that, having other business at Trenton, he did not return until the 22d or 23d of said January.

He charges the truth to be that the complainant well knew of his said judgment bond from the time of its date, and also well knew, when he took his deed, that this defendant had gone to Trenton to have it entered up; and that the complainant knew or suspected that the judgment had been actually entered when he took his deed, and also knew that the execution was in the hands of the sheriff long before he paid a cent of the purchase money; and he submits he was not bound in equity to apprise the complainant more than he was anybody else, of his intended action on his said bond; and he denies that he stood by and advised the said sale to the complainant, and that he saw the complainant purchase without in the slightest degree, (this is the language of the bill,) notifying him of any claim or encumbrance.

He admits that, subsequent to the conveyance to the complainant, the said Joseph H. and Holmes Van Mater were yet the owners of a very large and valuable real estate in said county, and that his judgment was a lien on said remaining real estate as well as upon said farm bought by the complainant; but he submits that, under the circumstances, he was not bound in equity to sell the said remaining real estate first before he could fall back on the farm sold to the complainant; but whether he was so bound or not, he charges the truth to be that all the said remaining real estate, except as hereinafter stated, has been first sold under this defendant's and other prior executions, leaving a balance on this defendant's execution, on the 21st of March, 1844.

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of \$3098.44, for the payment of which the said farm sold to the complainant is the only security.

He denies that, according to the best of his judgment and belief, there was ample real estate of said Joseph H. and Holmes Van Mater remaining, after the said sale to the complainant, to have satisfied this defendant's said judgment; but he admits that he did, together with the other previous judgment creditors, release the following portions of real estate, under the circumstances and agreements hereinafter stated, that is to say, he released the said Van Brunt farm, which was sold by said Joseph H. and Holmes Van Mater to one John Cook, on or about the 1st of April, 1842, for about \$13,000; but the said farm had, as aforesaid, a previous mortgage encumbrance of \$9000, which, with the interest, left about \$3500 to be paid by said Cook; and he released as aforesaid, upon the express condition that the whole of the balance of the said purchase money, after paying off said mortgage, except \$700, should be paid upon judgments which were prior liens to this defendant's said judgment, and were also liens upon the complainant's said farm and the said Middletown Point property; and he charges the truth to be that all of said balance of said purchase money, except the \$700 aforesaid, was paid upon said prior encumbrances; and he states that he was induced to grant said release upon the request of the said Joseph H. and Holmes Van Mater, which request was made, as he believes and charges, with the knowledge and assent of the complainant; and the said release was granted upon the further belief of this defendant that said sale to Cook was a very advantageous one, both for said Joseph H. and Holmes Van Mater and also to said complainant and the other creditors, being, as this defendant believes, for a much larger amount than it would have brought at a forced sale, and as has in fact turned out to be the case, the said Cook, on or about the 23d of October, 1843, having given up the said property to the mortgagees for the amount of their mortgage, and thus losing the whole \$3500 which he had paid on the same, over and above the said mortgage; and this defendant has no doubt that if said sale to Cook had not been made, but said farm had been sold at sheriff's sale with the balance of the property, it would not have brought any

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thing over the mortgage, and this would have increased the encumbrances ahead of this defendant's judgment, and which would have also been a lien on the complainant's farm of from \$2500 to \$3000. '

He admits that he released, with the other judgment and mortgage creditors, his lien on the Bruer farm, to one John Croes, on or about the 1st of April, 1842, which he did at the request of the said Joseph H. and Holmes Van Mater, which, as he believes and charges, was done with the knowledge and assent of the complainant; and he states that he was induced to grant said release because he thought it would be for the best interest, not only of the said Joseph H. and Holmes Van Mater, but also of the complainant and the prior judgment and mortgage creditors, as well as all the other creditors of said Joseph H. and Holmes Van Mater; that the price agreed to be given by Croes was about \$5000, which was about \$3000 more than the value of said Joseph H. and Holmes Van Mater's right in said property, as this defendant believes; and that this large amount was agreed to be given by Croes under the following circumstances—the said Joseph H. and Holmes Van Mater claimed title to said Joseph Van Mater's farm, the Van Brunt farm, and the Bruer farm, under the will of Joseph Van Mater, deceased, in which will, legacies to the amount of \$25,000 or \$30,000 were left, among which was one of about \$3500 to said Croes' wife; but it was disputed whether such legacies were or were not a lien upon the said last-mentioned farms, and there was also a dispute about the title of said Joseph H. and Holmes Van Mater to said Van Brunt farm, and, by way of compromise, the said Joseph H. and Holmes Van Mater sold said Croes the said Bruer farm for the said sum of \$5000, out of which was to be deducted \$3000, which was, as this defendant believed then, and still believes, \$3000 more than the real value of their interest; but this defendant joined in said release upon the express understanding that all the balance of \$2000 should be paid upon the encumbrances prior to his judgment; and he believes and charges that the whole of said \$2000 was appropriated towards satisfying said prior encumbrances, and reduced the liens on the farm of the complainant prior to that of this defendant, if the said lega-

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cy was a lien on said real estate, to the whole amount of the purchase money, and if said legacy was not a lien, then to the amount of said \$2000, the amount of cash actually paid by Croes.

He says he believes and charges that the right and title of said Joseph H. and Holmes Van Mater, in said last-mentioned farm, if sold at sheriff's sale, would not have brought more than said sum of \$2000.

He submits that he has not, by any act of his, released the complainant's said farm from the lien of his judgment.

He says that, on or about the 7th of December, 1842, the sheriff had advertised to be sold, the property of said Joseph H. and Holmes Van Mater, on the said judgments of Hendrickson and Laird, and that this defendant, as an act of friendship to said Van Maters, advanced to Laird the amount of his judgment, and took an assignment thereof, and that this defendant, Thomas G. Haight, and Hendrick Longstreet, with like motives, also advanced the amount of said Hendrickson judgment, and took an assignment thereof.

He admits that, on the 7th of December, 1842, a draft drawn by Joseph H. Van Mater, and endorsed by Holmes Van Mater, upon certain persons in Kentucky, and by them accepted, for \$6000, was assigned to him as collateral security for said Hendrickson and Laird judgments.

He states that said draft had fallen due about the 1st of February, 1842, and had been protested for non-payment, and was then in litigation in Kentucky, and it was very doubtful if anything would be realized therefrom.

He admits that, at the time of the said assignment of said draft, he executed a writing, under hand and seal, and delivered it to Joseph H. and Holmes Van Mater. He refers to the writing itself, for its contents.

He says that the plaintiffs in said Hendrickson and Laird judgments were urging the sale, and that, to induce this defendant to delay the sale, for the benefit of said Joseph H. and Holmes Van Mater, they proposed to assign him the said draft, as it was very doubtful if anything could be got by a sale on said Laird judgment, and that the object of the paper this defendant signed, was merely to show the fact that he had the assign-

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ment of the draft; and that as an inducement for him to make the arrangement, he had the privilege of paying off the Hendrickson judgment out of the proceeds of the draft, if he got it before it was collected by sale.

He admits he has received on said draft \$5287.52, but states that he received it in the following sums and at the following times:

February 23d, 1843.....	\$1,600 00
April 29th, 1843.....	2,350 00
October 31st, 1843.....	1,287 52

Out of which ought to be deducted \$17.06 for his expenses in obtaining it.

He denies that he wholly neglected and refused to apply the money on the two judgments aforesaid, but states that the first money he received on said draft he appropriated towards paying off the Laird judgment, as far as it would go, and that no sale was ever made under that judgment; but that this defendant, on the receipt of sufficient to pay off the same, considered and treated the same as satisfied; and he denies that he raised the whole or any part of the Hendrickson and Laird judgments, or either of them, by sales of any part of the property of said Joseph H. and Holmes Van Mater.

He says that other judgment creditors of said Joseph H. and Holmes Van Mater, among others, he believes the Bank of Middletown Point, becoming impatient, forced a sale of the personal property of said Joseph H. and Holmes Van Mater, on the 6th of March, 1843; but the sale was not on the motion of this defendant and those who held the Hendrickson judgment, but was forced on by other judgment creditors without the power of this defendant to prevent it, and the whole amount of the said Hendrickson's judgment paid out of the said personal property, except \$57.21.

He states that on the said 6th of March, 1843, only \$1650 had been received by him on said draft, which was not enough to pay off the said Laird judgment, and there was yet great doubt whether anything more would be received on said draft, and that by this means the said Hendrickson judgment was paid, except

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as aforesaid, without the power of this defendant to pay the same from the proceeds of said draft.

He says that the said Joseph H. and Holmes Van Mater, on the 7th of January, 1843, drew a draft on him in favor of one Hendrick Longstreet, for \$440.67, to be paid out of said first-mentioned draft, which this defendant accepted, on condition that he should receive on said draft enough for the purpose, after paying off said judgment of Laird and Hendrickson; and that on the 30th of December, 1844, at the request of Joseph H. Van Mater, he paid D. B. Ryall \$10 out of the proceeds of said draft.

That on the 31st of May, 1843, out of the proceeds of said second payment on said \$6000 draft, he paid to the sheriff of Monmouth \$57.21, the balance remaining due on said Hendrickson judgment.

That the said sum of \$1287.52, received by him on said draft on the 31st of October, 1843, and so much of the sum of \$2350, received April 29th, 1843, as remained after satisfying said Laird judgment and costs, and the balance of said Hendrickson judgment, and the said draft in favor of Longstreet, and the balance of the note on which this defendant was security to Hendrick Hendrickson, to wit, \$1155.30, this defendant received and appropriated, respectively, as and for a part payment and credit on his said last judgment of \$8106, and which still leaves a balance on his second judgment of \$2258.72 due him; and which sums of \$1155.30, April 29th, 1843, and \$1287.52, October 31st, 1843, he has credited on his said last-mentioned judgment; and he insists he had a right to make such appropriation.

He denies that divers other large sums of money, or any other sums of money, or \$700 or thereabouts, received on a certain note given by one Cook to said Joseph H. and Holmes Van Mater, and placed in his hands for collection, has never been in any way accounted for by him, or specifically appropriated by any one to the payment of any particular debt.

He says that the said Joseph H. and Holmes Van Mater, on the 1st of April, 1837, were indebted to one Hendrick Hendrickson in \$850, and gave their sealed bill therefor with this defend-

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ant as their security, the interest on which the said Joseph H. and H. Van Mater paid up to April 1st, 1842; that about the 1st of January, 1843, the said Holmes Van Mater assigned to him a note of one John Cook, on which was then due \$700 or thereabouts, as collateral security for, and to indemnify him for being security as aforesaid, to said Hendrickson; which note of \$700 this defendant collected from said Cook, and took the same and paid it on the said Hendrickson's note, and the balance of said note this defendant has paid out of the moneys he has received on said Kentucky draft; and he submits that the \$700 note and the said part of the said draft money has been so properly and legally appropriated; and he denies that the said Cook note was left with him merely for collection, but says it was assigned to him for the purposes aforesaid.

He admits that, subsequent to the said conveyance to the complainant, the said Joseph H. and Holmes Van Mater were the owners of a very large and valuable real estate, but subject to large encumbrances, as aforesaid; and he denies that there was enough left besides the complainant's said farm to pay his said judgment; and states that the whole of it has been sold by the sheriff, except as aforesaid, to pay said prior executions; and that there still remains due him, on his said first judgment, \$3098.44, April 14th, 1846; and he denies that he released any real estate of said Joseph H. and Holmes Van Mater without the assent of the complainant; but he charges that the complainant was well aware of and consented to all the proceedings had in relation to said farms sold as aforesaid to Croes and Cook; and he submits he has not thereby released the farm sold to complainant.

He admits that he had one judgment against said Joseph H. and Holmes Van Mater assigned to him, viz., the one in favor of Laird; but says that the other, viz., the one in favor of C. and G. Hendrickson, was assigned to him, Haight and Longstreet.

He admits that the Van Maters have been sold out, so far as regards the rest of their real and personal estate, by sundry executions in the sheriff's hands.

He admits the execution on his said judgment, and that the

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sheriff, under his orders, intends to sell said farm under his said execution.

He says he thinks he had heard, before he went to Trenton to enter up his said judgment, from A. Longstreet, that in case said exchange with A. Longstreet was effected, it was the intention of the said Joseph H. and Holmes Van Mater to sell said farm to complainant; but he did not know and had not heard of any specific negotiation for the purchase of said property, except as aforesaid.

He says he did not know or believe, nor does he now know or believe, that the complainant bought said property free, as he supposed, of this defendant's judgment, unless so far as that the complainant, knowing of this defendant's joint bond, and of his errand to Trenton, the complainant might have hurried the delivery of the deed without paying the purchase money, with the view of getting ahead of this defendant's judgment. And he denies that he advised selling the property on the terms stated in the bill.

He says he preferred entering up his judgment at Trenton, because other large creditors had done so, and for greater security, on account of its large amount, and to cover real estate which Joseph H. and Holmes Van Mater owned in other counties; and he denies that all their real estate was situated in Monmouth.

On this answer, a motion was made to dissolve the injunction.

P. Vredenburg, in support of the motion.

W. L. Dayton, *contra*.

THE CHANCELLOR. The questions to be decided on the final hearing of this cause will be—1st. Whether the judgment by virtue of which an execution has been issued and levied on the farm of the complainant, ever was a lien thereon; 2d. If it ever was a lien, whether the plaintiff in that judgment, by releasing other lands of the defendants therein, relieved the complainant's farm from the lien of the judgment; and, 3d. Whether certain moneys received by the plaintiff in the judgment, on a draft on third

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persons given by the defendants in the judgment to the plaintiff therein, as collateral security for prior judgments he held by assignment, should not be applied towards satisfaction of the judgment and execution on which the complainant's farm was advertised to be sold; the amount of the judgments for which said draft was given as collateral having been made by sheriff's sale out of other property of the defendants in the judgments, and the money due on the draft being subsequently received by the assignee of said judgments.

The facts stated in the bill present these questions. To dissolve the injunction and permit the complainant's farm to be sold under this judgment, at sheriff's sale, to the highest bidder, while a serious question is pending here whether it can be sold at all under the judgment, would be indiscreet.

The injunction will be retained until the hearing.

The motion to dissolve the injunction is denied.

Costs to abide the event.

Order accordingly.

Hendrickson v. Anderson.

MARY HENDRICKSON, SURVIVING EXECUTRIX OF BENJAMIN
HENDRICKSON, JR., DECEASED, v. JOSEPH B. ANDERSON
AND MATILDA, HIS WIFE.

B. H., by his will, directed that when his youngest daughter should attain 18, the executors should sell a certain farm, and place the proceeds at interest, to be equally divided among his daughters, and be paid to them when they respectively attained 18, provided that it should be in the discretion of his executors, or the survivor of them, to place the same in the hands of trustees for the use of his daughters, or either of them, to be paid to them, or the interest paid to them, free from the debts or control of any husband. J. B. A. married a daughter, who died, leaving a daughter by him. Afterwards the executors sold the farm, and J. B. A. received from them \$1000 of the proceeds, and gave his bond and mortgage to the executors. Afterwards J. B. A. married another daughter, and also obtained letters of guardianship of the estate of his daughter by his first wife. On bill to foreclose the mortgage, the court refused to allow the shares of J. B. A.'s daughter and wife of the proceeds of the farm to be set off against the mortgage.

Bill filed May 28th, 1846, to foreclose a mortgage dated April 15th, 1837, given by the defendant Joseph B. Anderson to Mary Hendrickson and Joseph S. McIlvaine, executors of the will of Benjamin Hendrickson, Jr., deceased, to secure a bond of the same date, given by the said defendant to the said executors, conditioned for the payment of \$1000 on the 15th of April, 1838, with interest. Anderson, since the giving of the mortgage, has married his present wife, Matilda, and she is made a party defendant.

The bill states that Anderson has paid the interest on the mortgage up to April 15th, 1843. The executor McIlvaine is dead.

The defendants answered the bill. The answer states that Benjamin Hendrickson, Jr., the testator in the bill named, was the husband of the complainant; that he died, leaving one son, Benjamin, and seven daughters, to wit, Sarah, Matilda, Cornelia, Elizabeth, Charity, Maria and Julia Ann, who were all unmarried at the time of his death, which occurred on the 28th of January, 1829.

That the said testator, by his will, after making certain be-

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quests to his said wife, the complainant, in lieu of dower, and in trust to bring up, maintain, and educate, in a proper manner, his said children, did, among other things, direct that, whenever his youngest surviving daughter should attain the age of 18 years, his executors should sell and dispose of his farm called the Reed farm, in such manner as they should deem most for the benefit of his estate, and, in case they should consider it more for the interest of his estate to sell the same sooner, they might do so, and that, whenever said real estate should be sold, the proceeds should be placed at interest, on good landed security, and be equally divided among his said daughters, and be paid to them when they, respectively, attained 18, provided that it should be in the discretion of his executors, or the survivor of them, to place the same in the hands of trustees, by a proper conveyance, for the use of his said daughters, or either of them, and be paid to them, or the interest paid to them, severally, as they might deem proper, free from the debts, control, or disposal of any husband, and that if any of his daughters should die leaving issue, the said issue should stand in the place of their parent.

That on the 2d of May, 1833, the defendant Joseph B. Anderson married Sarah, the eldest daughter of the said testator. That said Sarah had attained 18 on the 8th of January, 1830, and was entitled, under the said will, to one-seventh of the proceeds of the sale of the said Reed farm, whenever it should be sold by the said executors.

That the executors of said will, in the exercise of the discretion thereby vested in them, sold the said Reed farm on the 11th of April, 1837, for \$3000.

The defendant Anderson, answering for himself, says that, immediately on the said sale being made, he applied to the said executors to pay over to him and his said wife Sarah, the one-seventh of the proceeds of said sale, being \$428.57, or to secure the same to the said Sarah in the manner prescribed by the said will, if, in their discretion, they were disposed so to do; but this the said executors declined to do, alleging that, by the terms of said will, distribution of the said proceeds was not to be made until Julia, the youngest daughter, attained 18, which would be on the 7th of December, 1842, a construction which this de-

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defendant and his said wife were advised was erroneous, and to which they refused to assent. But, in order to avoid litigation, and in the hope that the matter would be amicably settled, it was agreed, by and between the said executors and this defendant and his said then wife, that this defendant should take \$1000 of the proceeds of the sale, and give therefor his bond and mortgage, and, accordingly, on the 15th of April, 1837, four days after the said sale, the said executors paid over to this defendant \$1000, part of said proceeds, and he thereupon gave the bond and mortgage mentioned in the bill.

The defendant Anderson further says that his said wife Sarah died January 2d, 1836, leaving a daughter, Ann Eliza, an infant of tender years, and that, on the 6th of June, 1846, he was, by the Orphans' Court of Mercer, admitted as guardian of the estate of the said Ann Eliza, and, as such guardian, he claims to be entitled to the one-seventh of the said \$3000, being \$428.57, with interest thereon from the said 11th of April, 1837, to be allowed to him out of the sum so secured by the said mortgage, and which, he insists, was loaned to him to secure the payment of such distributive share and interest.

The defendant Matilda R. Anderson, answering for herself, says that she is the second daughter of the said testator; that she attained 18 on the 4th of December, 1831; that she lived at home with her mother, the complainant, and earned her livelihood, as she believes, from the time she came of age until she married, and that she never, during that time, or at any time before, demanded or received any part, either of the principal or interest, of her seventh of the proceeds of said sale, but suffered the same to remain in the hands of the said executors, and the interest thereon to accumulate.

The defendants further say that, on the 7th of June, 1839, they intermarried; that after their marriage, they called on the said executors to pay over to them the distributive share to which she, the said Matilda, was entitled, as aforesaid, with interest thereon from the said 11th of April, 1837, but that the said executors refused to do so, still insisting that the said distributive shares were not payable until the youngest daughter attained 18 years, and further represented that, as this defendant Jo-

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seph B. Anderson had in his hands \$1000 of the proceeds of sale, these defendants were perfectly secure of the final payment of the legacy bequeathed to the said Matilda, as well as that bequeathed to the said Sarah, and now belonging to the said daughter of the defendant Joseph B. Anderson.

The defendants further say that, in the term of September, 1844, of the Orphans' Court of Mercer county, the complainant, as executor as aforesaid, presented an account for settlement, in which she only charges herself with interest on the said \$3000 from the 27th of December, 1842, the day when the youngest daughter of said testator came of age; to which account these defendants and others excepted, claiming that interest ought to be charged on each daughter's share of said sum from the time of the sale of the said farm; which exception was disallowed by the said court; whereupon the exceptants appealed to the Prerogative Court, and in the term of June, 1845, the said decree of the said Orphans' Court was reversed, and a decree made that said account should be re-stated by the register of said court, charging the accountant with interest from the 11th of April, 1837, said interest to commence running, as to each daughter's share, as she was or became 18 at or after the said 11th of April; and that the said account was so re-stated.

That, by said account, it appears that the principal and interest of the share of the said Ann Eliza Anderson, the daughter and ward of the defendant Joseph B. Anderson, remaining in the hands of the complainant on the 26th of June, 1845, after deducting all charges for expenses and commissions allowed to the complainant, was \$554.14; and the principal and interest of the share of this defendant Matilda remaining in the hands of the complainant on the said day, after deducting all charges as aforesaid, was also \$554.14; and that the said two sums amounted to within about \$25 of the whole amount of principal and interest due on the bond and mortgage given by the defendant Joseph B. Anderson to the said executors as aforesaid.

The defendant Anderson, answering for himself, says that he has repeatedly, since the said account has been settled in the Prerogative Court, called on the complainant and offered to pay her the principal and interest of the said bond and mortgage, if

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she would pay over to him or satisfactorily secure the distributive shares so as aforesaid due to his said daughter and his wife ; but that she has refused to do so.

The defendants further say, that the complainant is upwards of 60 years old, and very infirm, and not capable, as they believe, to transact business with safety or satisfaction to herself or others ; that she has never given any security for the estate in her hands ; that this defendant Anderson, on the 5th of December, 1843, with his brother-in-law, J. F. Rose, became security for her on a note given by her to one Theophilus Hart or order, for \$560 25, which is still unpaid ; which note was given to secure an individual debt of her own, incurred for labor done for her on the homestead farm while she had the use of it under the will ; and that these defendants are under serious apprehension, and believe that if the complainant should get the money due on the said bond and mortgage into her hands, it would be misappropriated, and not applied to the payment of the said distributive shares, and that the same would be thereby lost.

The defendants admit that, inasmuch as the money for which the said bond and mortgage were given was a part of the proceeds of the sale of the said Reed farm, and was placed and continued in the hands of the defendant Anderson as a security for the payment of the said distributive shares, the said shares ought to be charged as an equitable lien on the fund secured by the said mortgage ; and that the said fund should be applied to the payment and satisfaction of the said sums so due to these defendants, according to their several rights under the will of the said testator.

The cause was heard on the pleadings and evidence.

C. S. Green and *P. D. Vroom*, for the complainant, cited 3 *Green's Ch.* 212 ; 1 *Smith's Ch. Pr.* 459.

S. G. Potts and *W. Halsted*, for the defendants. They cited 1 *Halst. Ch. Rep.* 112 ; *Saxton's Ch.* 413, 424 ; 2 *Story's Eq. Jur.*, § 1435, 6, 7 ; 7 *Porter's Alab. Rep.* 549 ; 7 *Marshall* 37 ; 2 *Green's Ch.* 376 ; 4 *Johns. Ch.* 616 ; 1 *Hopk. Ch.* 239 ; 9 *Ves.* 563 ; 1 *Green's Ch.* 467.

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THE CHANCELLOR. There is no proof of the agreement set up in the answer between the executors and Anderson at the time the money was received by him for which he gave the mortgage. Nor is there any proof of insolvency of the complainant. These special grounds on which the application to make the set-off is made, therefore, fail.

The question, then, is, can the distributive share due Anderson's daughter, of whose estate he is guardian, and the share due his present wife under this will, containing a provision giving the executors, or the survivor of them, the discretion to convey her share to a trustee for her separate use, be set off against the amount due from Anderson to the complainant, on the mortgage given by him to the executors, or can either of these shares be so set off.

In reference to the share of Anderson's present wife, the discretion given by the will to the surviving executrix to vest it in a trustee for her separate use, is a sufficient reason for refusing to allow the set-off.

As to the share due Anderson's ward, Anderson is not here as guardian—*i. e.*, the bill does not bring him here as such, nor is the ward a party to the suit. And I do not see any peculiar circumstances to justify or call for the equitable interference of the court.

Decree for complainant.

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STEPHEN R. PARKHURST v. ISRAEL KINSMAN AND WILLIAM CUNDLE.

1. P, owning two-thirds of a patent right, filed a bill against K., to whom he had sold the other third, to compel the performance of an alleged agreement between them by which K. bound himself to discontinue the manufacturing under the patent, when he should have made enough out of the profits of the business to reimburse him certain advances he had made for commencing the manufacture, the bill alleging that he had made enough to reimburse his advances. The bill prayed that K. might be decreed to discontinue, and prayed an injunction restraining K. from manufacturing. K., by answer, read as an affidavit on the application for an injunction, denied that he had yet reimbursed himself, and also denied that he was manufacturing under the patent, and claimed that the article he was manufacturing was not within the patent, but a different article.

2. The injunction was denied.

In July, 1846, Stephen R. Parkhurst exhibited his bill, stating that on the 1st of May, 1845, he, being the original inventor of a certain machine, (described in the bill,) obtained letters patent, under the seal of the patent office of the United States, granting to him, his heirs, administrators, or assigns, for 14 years from that day, the exclusive right of constructing, using, and vending certain new improvements in the construction, arrangement, and combination of mechanical means for picking, ginning, and carding wool, hemp, or cotton, so as to separate the fibres of those articles from seeds and foreign substances, either acting separately, or in combination with the common carding machine.

That on the 22d of May, 1845, he entered into an agreement with Israel Kinsman, a merchant of New York, reciting that he had invented a machine for picking, &c., which he claims as his own invention, and has taken out letters patent for, and providing that he, in consideration of \$1, and of the covenants and agreements therein contained, doth sell and transfer to Kinsman, his heirs and assigns, the undivided 3d part of his right, title, and interest in said machine and of all improvements which he, Parkhurst, might thereafter make thereon; also an undivided third part of a drying machine, lately patented by him,

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Parkhurst; and that Kinsman, in consideration thereof, covenanted and agrees to pay Parkhurst \$2000, in cash down, and his note at sixty days for \$1000; also to loan the concern the necessary amount of money, not to exceed \$1000, to purchase machinery, stock, &c., to manufacture machines, which sum shall be repaid to Kinsman out of the first profits realized from sales; also agrees to give his personal attention, so far as necessary, to the business of the concern; all expenses for labor, materials, manufacturing, &c., consequent upon a vigorous prosecution of the business, to be first paid out of the proceeds of sales, and the balance, over and above what is necessary for capital to prosecute the business to advantage, to be paid over, from time to time, to the parties aforesaid, one-third to Kinsman and two-thirds to Parkhurst.

That the complainant went into business under the said articles of agreement, and continued to manufacture said machines, at No. 60 Vesey street, New York, until it became necessary for him to go to England, when he executed to Kinsman a power of attorney to carry on the business of said manufactory for the mutual benefit of said Kinsman and the complainant, according to the provisions of the said agreement; which power of attorney Kinsman received and acted under, for a few months, when the complainant returned from England, and Kinsman then surrendered to him the said power of attorney.

That it became necessary for him again to go to England; and he then, to wit, on the 4th of November, 1845, gave a power of attorney to one Warren Holt, of Bloomfield, New Jersey, to carry on the said manufactory in the same manner in which it was then conducted; and on the 6th of November, 1845, the complainant left for England.

That Kinsman then went on making said machines, using the complainant's tools and implements for that purpose; and that Kinsman, when he was acting under the power of attorney so given him by the complainant as aforesaid, made and sold a number of said machines, and secured the whole of the proceeds of said sales, and received for machines made by him, between November 6th, 1845, and the month of February, 1846, more than \$1400.

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That the manufacture and sale of said machines is a profitable business, and that Kinsman retained all the proceeds and profits of the sales so made by him; and though often requested by said Holt, the attorney in fact of the complainant, to pay over to him, for the complainant, the portion of said profits belonging to complainant by force of the said letters patent, and of said agreement, and which was due the complainant, the said Kinsman refused to pay the same either to the complainant or his said attorney; and although he repeatedly promised said Holt that he would render an account of the sales and the profits in said business, yet he always neglected so to do, and when applied to by Holt, would make excuses and postpone the giving of such statement of said accounts.

That Kinsman had made some advances and been to some expenditure in carrying on said business, but the complainant is ignorant of the amount so advanced and expended by him; but avers that Kinsman, on or about February 9th, 1846, told Holt, the attorney of the complainant as aforesaid, that he would in a few weeks realize enough from said business to pay all the debts arising therefrom, and to cancel all his demands; and Holt, for the purpose of being relieved from any further difficulty with Kinsman, in the name of the complainant, made and executed an agreement with Kinsman as follows: (setting out the agreement.) It is executed February 9th, 1846, between Kinsman, of New York, of the first part, and Parkhurst, of same place, of the second part. It recites that Kinsman has advanced moneys and become responsible for various sums which had been expended in getting up machinery, tools, stock, &c., for the manufacture of burring and carding machines invented by Parkhurst, one-third of which he sold and assigned to Kinsman; and then provides that Kinsman, in consideration of \$1 to him paid by Parkhurst, contracts and agrees that as soon as the profits which have accrued, and which might thereafter arise from the manufacture and sale of said machines so made and sold by Kinsman, shall be sufficient to pay all legal demands for the purchase of machines, tools, &c., and the expenses incurred by Kinsman, that then Kinsman shall and will discontinue the manufacture and sale of

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said machines ; and that all the machines he shall manufacture and sell after that date shall not be sold for a less profit than \$100 each ; and that he will be accountable for \$100 profit on each machine made and sold from that date, unless he has the written consent of Parkhurst to sell for less. And Parkhurst, in consideration of \$1 to him paid by Kinsman, and of the agreements aforesaid, covenants and agrees with Kinsman that he will go on and manufacture said machines, as soon as Kinsman discontinues the same, and that he will not sell any machine for a less profit than \$100, without the written consent of Kinsman, and that he will pay over to Kinsman one-third of said profits on all machines he makes and sells thereafter ; and that for any machines he may make or have made before the discontinuance of the building the same by Kinsman, he shall be subject to the same restrictions of selling for at least \$100 profit on each, one-third of which shall be paid to Kinsman. Signed and sealed by Kinsman, and for Parkhurst "by Holt, by power of attorney."

That on the day on which said agreement was executed and delivered, Kinsman had, without the knowledge and consent of Holt, and while the complainant was absent in England, sold all the tools and implements procured for the purpose of making said machines, and which were then in the shop No. 60 Vesey street, New York, to William Cundle, of Paterson, New Jersey, for which tools Cundle gave his note, payable to Kinsman, in a sum unknown to complainant.

That Cundle removed said tools to Paterson ; and that he and Kinsman have ever since been employed in making and selling said machines, and have realized large profits therefrom.

That Kinsman stated to Holt, attorney as aforesaid, in November, 1845, that all the debts of the concern did not exceed \$1600.

That Kinsman sold machines, during November and December, to the amount of \$1400, and continued making machines up to the 9th of February last ; and that since that time Kinsman and Cundle have sold at least from 30 to 40 of said machines, and by the agreement last aforesaid they were not to be sold for a less profit than \$100 each, without the written con-

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sent of complainant or his said attorney.

That the note for \$1000, given by Kinsman to complainant for one-third part of the patent right, as stated in the first-mentioned agreement, has never been paid, either in whole or in part, which note would constitute a just and equitable set-off against any claim Kinsman might have had by reason of any expenditures or advances. And the complainant avers that Kinsman is largely indebted to him by reason of his neglecting and refusing to pay over to complainant the portion of the profits which, by the agreement first set forth, belong to him ; that Kinsman, up to this time, neglects and refuses to render any account to complainant, or his said attorney, of the proceeds and profits of the business, or to surrender up the manufacturing of said machines to the complainant, according to the provisions of said last agreement ; but is now, in connection with Cundle, manufacturing on their own account, and to the injury and damage of complainant.

That Kinsman and Cundle, with a view of still further injuring the complainant, have sent and still send out and sell said machines, without making or stamping them as the patent of the complainant.

That the complainant is ready, and has made arrangements and is desirous to carry on the manufacture of said machines, according to the terms of the agreement secondly set forth, as soon as Kinsman shall surrender up the said manufacture, as by the said agreement he ought to do.

The bill charges that Kinsman and Cundle refuse to render an account to the complainant of the business connected with the making of said machines, or of the amount received from the sales thereof, and refuse to pay to the complainant, or said Holt, the two-thirds of the profits, or to account for the same ; and that, although said Kinsman has been much more than remunerated for any advance or expenditure by him made, yet the said defendants refuse to surrender up the business to the complainant, or to Holt, his attorney ; but the defendants pretend, among other things, that the machines made by Kinsman and Cundle since February 9th, 1846, are not like the machines patented by the complainant, but are an invention and improvement of their

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own ; whereas the complainant charges that they are, in all material respects, the same.

The bill prays that the defendants may be decreed to account for all money received from the sale of the machines from the said 1st of May, 1845, and to pay over to the complainant two-thirds of the profits ; and that the defendants may be decreed to surrender up the business of manufacturing said machines, according to the provisions of the last-mentioned agreement ; and that the defendants may be enjoined from further manufacturing or selling said machines, or any machine which in any manner is included in the said patent.

An application was made, on the filing of the bill, for an injunction according to the prayer thereof, and notice of the application was directed to be given ; and, after argument, the injunction prayed was denied.

The application was renewed, and the parties were again heard. On the second application, Kinsman's answer was read as an affidavit.

He admits the patent to the complainant ; but says he cannot admit that the complainant is the original inventor ; but says that the merit of the invention belongs to Charles G. Sargeant, of Lowell, Massachusetts.

He admits he entered into the agreement of May 22d, 1845, and says that he paid the \$2000 therein named, in cash, and gave his note for \$1000, which has not been taken up ; but he says he has charges against the complainant as offsets, for more than sufficient to balance the note.

He admits he went on making machines under said agreement, at No. 60 Vesey street, New York, and that when the complainant went to England, he did, at the suggestion of this defendant, to avoid all question as to this defendant's power and control over said business, execute to him a power of attorney to conduct the business on his account during his absence, and which power ceased on the return of the complainant to the United States.

He admits that on the complainant's leaving this country a second time for England, he gave a power of attorney to said

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Holt, to conduct said business in his behalf; but he has no remembrance of the extent of the powers conferred by that instrument on Holt, who is the son-in-law of complainant, and he therefore asks that the said power of attorney may be produced and proven.

He denies that, by said power, or any other, the complainant authorized Holt to enter into the agreement of February 9th, 1846, so as to bind the complainant thereby.

He admits that, after entering into the agreement of May, 1845, he laid out, from time to time, large sums in machinery, stock and tools, to conduct the business, a particular account of which is contained in Schedule A, annexed; and that he sold a number of machines made under said agreement, of which Schedule B, annexed, contains a true account; that he has subjoined, in Schedule C, annexed, a general statement showing the balance due him on the account for work done and sold, and expenses incurred under said agreement, and which he believes to be correct; and he says he has no recollection, beyond what these accounts show, of the amount due him, at any particular time or times, nor that he stated to Holt, in November, 1845, that all the debts of the concern did not exceed \$1600; that if any sum was named it must have been merely conjectural, for the accounts were not made up, and he did not know either the amount of moneys expended by him for the concern, or the amount received from sales.

He denies that he did, to his recollection, say to Holt, in or about February, 1846, that he would, in a few weeks, realize enough from the business to pay all the debts.

He admits that, on the 9th of February, 1846, he entered into the agreement with Holt in behalf of complainant. He says that, prior to entering into this agreement, he had heard from Ziba Parkhurst, brother of complainant, that said Sargeant claimed to be the inventor; but that, to the time of signing said last agreement, he believed that the complainant was the inventor, and that Sargeant was an impostor, and so expressed himself.

He says he believes the accounts annexed contain a full account of all the machines made or made and sold by this de-

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fendant under said agreement or the said patent. That he found the machines made according to the patent, whether complainant was the inventor or not, would not answer the purpose, and he accordingly gave up making machines according to it, and made an arrangement with Cundle, of Paterson, New Jersey, for constructing machines on a new plan, and which, he admits, they have been engaged in making, and have made and sold to a considerable extent; and he denies that the said machines so made by him, and of which he has rendered no account in the schedule annexed, were made under the complainant's patent, or under any agreement stated in the bill, or in violation of the terms of the agreement of February 9th, 1846.

He admits he sold the tools in the shop in New York to Cundle, and he supposes he had a perfect right to do so; that the sale was made in good faith, and the concern credited with the proceeds; and he denies, if such is intended to be intimated by the bill, that the said tools were ever designed to go into the possession of Holt.

He admits that Cundle took said tools to Paterson, and that he worked there for and on account of this defendant, and that Cundle has no interest in this suit beyond that of this defendant, nor in the manufacture and sale of said machines.

He denies he owes the complainant, but insists that the complainant is largely indebted to him; and that he would have a perfect right to go on and manufacture machines to a very considerable extent beyond those already made, and sell them, to discharge the indebtedness of the said concern to him, and for advances made by him.

He admits that, on the machines now making by him, he does not stamp the patent of complainant, and for the reason that they are not made under said patent.

He says he is willing and desirous to settle his accounts with the complainant, and has always been willing and desirous to do so.

F. T. Frelinghuysen and Mr. Staples, of New York, for the motion.

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W. Pennington, contra.

THE CHANCELLOR. The complainant owns two-thirds of the patent, and the defendant one-third. The bill is filed to compel the performance of an agreement by which, it is alleged, the defendant bound himself to discontinue manufacturing the machines when he should have made enough out of the profits of the business to re-imburse him certain advances he had made for putting the manufacture of the machines in operation. The bill alleges that the defendant has made enough to re-imburse him the said advances; and asks that he be compelled to discontinue, in fulfillment of his agreement, and that he be enjoined, *in limine*, from further manufacturing.

The answer, which was read as an affidavit, denies that the defendant has yet re-imbursed himself by manufacturing under the patent.

Whether the court will decree the specific performance of such an agreement, will be the question on the final hearing.

If it were palpable that the defendant had, by manufacturing under the patent, made enough to re-imburse him, it would not follow, necessarily, that the court would oblige him to discontinue, in fulfillment of his agreement. He owns a third of the patent, and has, therefore, a right to manufacture under it. The complainant, being the owner of the other two-thirds, has also a right to manufacture under the patent. Each would be accountable to the other for his proportion of the profits. It being, at least, uncertain whether a decree for the specific performance of such an agreement would be made, a preliminary injunction, which would compel an initiative performance of it, cannot be allowed.

It is evident that the difficulty between these parties lies beyond this. An injunction would probably not have been asked on the foregoing view of the case.

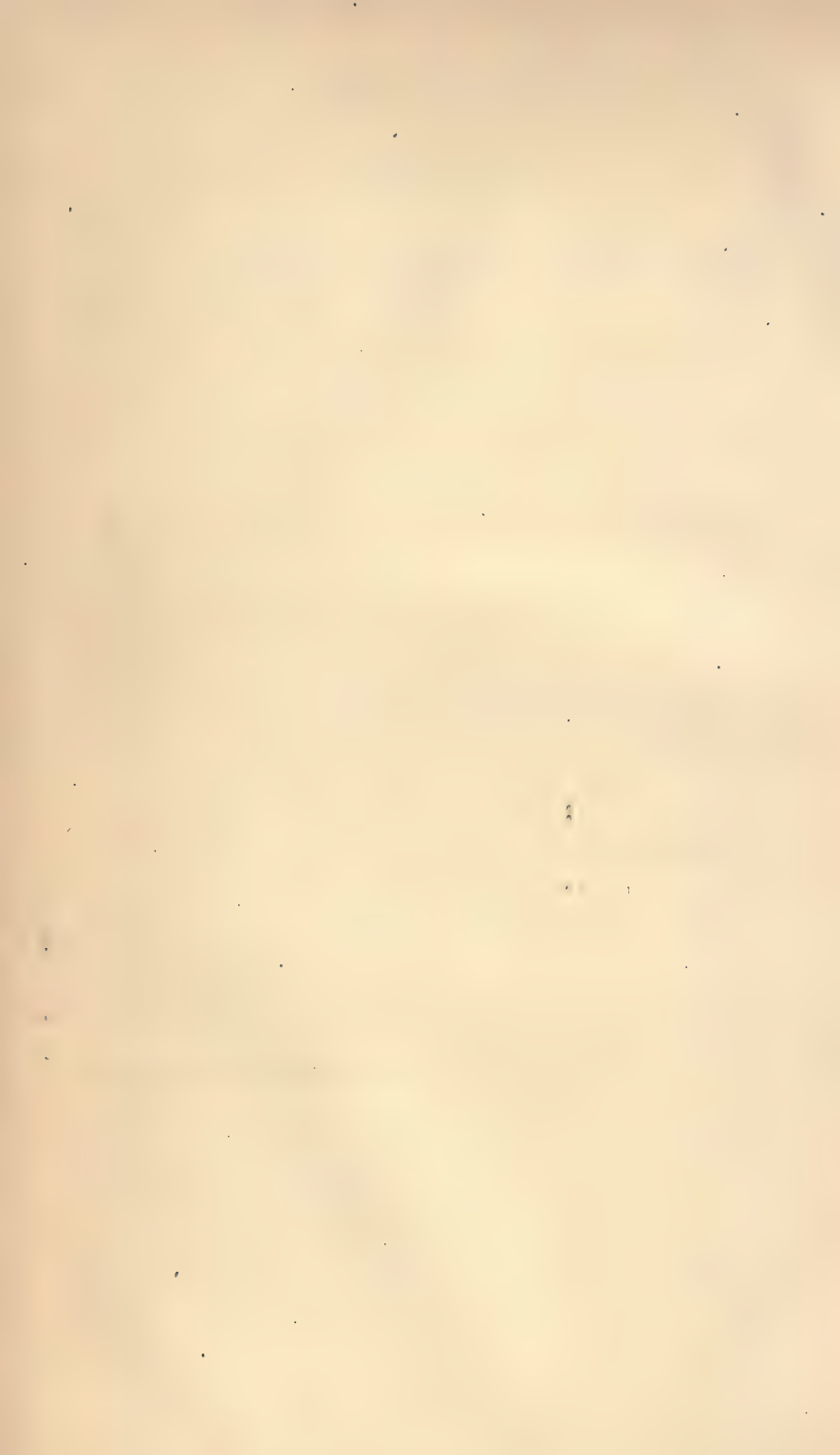
The real difficulty is, that the defendant denies that he is manufacturing under the patent, and claims that the article he is manufacturing is not within the patent, but is a different article.

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It is really, therefore, a question of infringement of a patent right.

Of such questions state courts have no jurisdiction.

Injunction denied.



REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES,

IN THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

GEORGE B. HALSTED,

REPORTER.

CASES
ADJUDGED IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM CHANCERY.

APRIL TERM, 1848.

ELIAS W. CONOVER, APPELLANT, v. SUSAN WRIGHT, RESPONDENT.

1. The statute of limitation of New Jersey, (*Rev. L.* 411, § 10; *Rev. Stat.* 95, § 11,) applies to the action of dower, and may be pleaded in equity as well as at law.

2. When the bill does not state any circumstances to take the case out of the statute, the plea may be a pure plea.

3. It is not required to be accompanied by an answer when the bill simply contains the formal allegation in regard to title papers, usual in bills for dower, in order to bring them within the jurisdiction of a court of equity.

This case is reported *ante p.* 482.

Appeal from the decree of the Chancellor. The respondent filed, July, 1846, her bill of complaint against the appellant, in which she sought to recover dower in certain lands in his possession. The bill stated the seizure in fee of her former husband, Barzillai Wright; a sale by the sheriff to the appellant; that her husband died 1st March, 1836, leaving the complainant him surviving, entitled to dower in the said freehold premises, &c.

The defendant pleaded in bar that the said Barzillai Wright died above twenty years before the filing of the said bill or service of process, and that the right or title and cause of action

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(if any,) of the complainant accrued above twenty years before the filing of the said bill, &c., and therefore that the said defendant pleaded the statute of New Jersey entitled, &c.

The cause was heard before the Chancellor under an agreement that if the plea should be allowed by the court, it should be considered as proved, and a final decree made thereon.

The Chancellor, after argument, overruled the plea, with costs, and from this order the defendant appealed.

The case was heard by Justices WHITEHEAD, CARPENTER and RANDOLPH, and Judges PORTER, SPENCER, SCHENCK, SPEER, SINNICKSON and McCARTER; the Chief Justice and Justice NEVIUS not sitting.

C. S. Green and P. D. Vroom, for appellant.

This is the case of an ordinary bill for dower, and the statute of limitations pleaded thereto. The plea was overruled below on the ground that the statute, (*Rev. L.* 411, § 10,) does not apply to dower. The decision of the Chancellor conflicts with the previous decision of the Supreme Court, and the question is now definitely to be settled in this court.

The cause of action accrued on the death of the husband, when it became the duty of the tenant to assign dower. 4 *Kent* 30; *Ib.* 66. The non-performance of this duty was wrongful and amounted to a forfeiture. 3 *B. C.* 172. The statute expressly bars all actions for land unless brought within twenty years after the cause of action accrued. *Rev. Laws* 411, § 10; *Berrien v. Conover*, 1 *Har.* 107; *Tuttle v. Wilson*, 10 *Ohio* 24; *Jones v. Powell*, 6 *Johns. Ch. Rep.* 194; *Ramsay v. Dosier*, 1 *Const. (S. C.) Rep.* 112.

The statute applies equally in courts of equity and in courts of law. *Angell on Limitations* 24 (*Ed.* 1846); *Wanmaker v. Van Buskirk*, *Saxton* 691; *Peacock v. Newbold*, in this court, *October Term*, 1845, 1 *Halst. Ch. Rep.* 553.

W. Halsted, contra.

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The statute does not apply to dower. The statute in regard to dower, (*Rev. L.* 398,) declares what shall bar dower, but does not mention lapse of time as a bar. There has been no adverse holding against the widow, and therefore the statute does not run against her. *Parker v. Obear*, 7 *Metc.* 24; *Barnard v. Edwards*, 4 *New Hamp. R.* 109; *Spencer v. Weston*, 1 *Dev. and Bat.* 213; *Guthrie v. Owen*, 10 *Yerg.* 339; *Park on Dower* 311.

The widow has no right of entry until dower has been assigned. 1 *Cruise* 159, tit. "Dower," ch. 4, § 1; *Litt.*, § 43; 4 *Mass.* 388; 7 *John. Rep.* 247. Not even after judgment. 16 *Mass.* 193.

The widow's right of dower is no title to land, but a mere chose in action; an inchoate right to an unascertained part. 17 *John.* 168; 20 *Ib.* 411; 4 *Kent.* 68; *Watkins on Descents* 101; *Gilbert on Tenures* 26; *Salk.* 422; 3 *Barr (Pa.) Rep.* 71.

But if at law, the statute is no bar in equity. At any rate the plea should have been accompanied by an answer denying fraud. *Beame's Pleas* 175; *Ib.* 168; 1 *Story Eq. Jur.*, § 628, note 640; *Curtis v. Curtis*, 2 *Bro. C. C.* 620; 4 *Kent* 69.

CARPENTER, Justice, delivered the opinion of the court.

Whether courts of equity act in obedience or in mere analogy to the statute of limitations, it has become a settled case that they will apply them, in similar cases within the sphere of their jurisdiction, equally with courts of law. They have always felt themselves bound by the spirit and meaning of these statutes, and ordinarily act in conformity to them. In cases concurrent with a remedy at law they always allow them to be pleaded, and a party is not permitted to evade their effect by resorting to another forum. *Angell on Limitations*, ch. 3, p. 24; *Saxton* 691.

The objection, it would seem, may be taken by demurrer to the bill, if so framed that it appears on its face and no attendant circumstances are stated which will obviate it. If the objection does not appear on the face of the bill, as in the present instance, it may be taken by way of plea, or by way of answer. When the objection is taken by way of plea to a bill which does

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not state any circumstances to take the case out of the statute, such as fraud, &c., the plea may be a pure plea, though otherwise if the bill should charge a fraud which had not been discovered within the period named in the statute. In such case the plea should be accompanied by an answer, answering and denying the circumstances of fraud alleged, in order to avoid the bar. *Story Eq. Pl.*, § 503; *Ib.*, §§ 751, 754.

The bill in this case is in the ordinary form of a bill for dower. The death of the husband is alleged within the period mentioned in the statute. No unusual circumstances of equity jurisdiction are set forth. It alleges no matter of concealment in order to avoid the operations of the statute; no ignorance of her rights is pretended by the complainant. The bill contains nothing beyond the formal allegations in regard to title papers always found in such bills, for the purpose of bringing what is ordinarily a mere legal right within the jurisdiction of a court of equity. If the statute applies to dower the defence seems to have been properly raised by the defendant's plea.

But it was but urged upon the part of the respondent that the 10th section of our statute of limitations (11th in the revision) does not apply to the action of dower, and consequently cannot be pleaded either at law or in equity; and such is the view taken by the Chancellor. One section of our act, copied from the English statute of 21 *Jac.* 1, *ch.* 16, § 1, bars the right of entry into any lands, &c., unless made within twenty years after such right or title shall accrue. The widow has no right of entry until dower assigned, and the statute of 21 *Jac.* 1, in England, and similar statutes in this country, have therefore been construed not to apply to the action of dower. It (21 *Jac.* 1,) applies only to a right of entry, and therefore by its terms is inapplicable to the action of dower, which is founded, not on the right of entry, but on an inchoate right to have the one-third part of any lands of which the husband had been seized during coverture, set off and assigned to her.

But the next section of our act, (*Rev. L.* 411, § 10,) goes further, and enacts "that every real, possessory, ancestral, mixed, or other action, for any lands, &c., shall be brought or instituted within twenty years next after the right or title thereto shall ac-

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crue, and not after ;” with a saving clause in favor of infants, *feme covert*s and insane. It in very terms applies to all actions for the recovery of lands, tenements and hereditaments, and it is difficult to see how it can fail to apply to the action of dower. It bars, not the right of entry merely, but any action brought for the recovery of land, &c. Land is sought to be recovered in this action, and the widow’s title becomes absolute on the death of the husband. By the statute of *Magna Charta*, the heir had forty days within which to assign dower ; a provision incorporated into the third section of our act in relation to dower. If not assigned within that period, the tenant becomes guilty of deforcement, and liable in an action of dower. The widow’s title, and her cause of action, then accrue, the possession of the tenant as against her then becomes adverse, and the statute begins to run.

It is true, lapse of time is not enumerated in the statute relative to dower as a bar to the action, and obviously because it naturally falls within another classification. *Parker v. Obear*, 7 Metc. 24, is a decision upon a statute very similar to the 10th section of our act, which the court then held did not bar the writ of dower. But that decision may well be sustained upon the ground that, in the State of Massachusetts, the widow’s cause of action does not accrue at the death of her husband, but only from the time of demand made. Here a demand is not necessary in order to support the action, although it may be important as affecting the amount of damages. Taking a different view than the Chancellor of the policy of the statute, and holding the action of dower to be not only within the letter, but the meaning and intent of the statute, we are unanimously of the opinion that his decree must be reversed.

The decree is reversed, with instructions to enter a decree for costs in the court below.

Per tot. cur. Decree reversed.

COURT OF ERRORS AND APPEALS.

JULY TERM, 1848.

JOHN I. RYERSON AND ABRAHAM DEMAREST, PETER H. PULIS AND PETER H. WINTER, EXECUTORS OF ABRAHAM H. GARRISON, DECEASED, APPELLANTS, v. FREDERICK ADAMS, EXECUTOR OF JOHN I. TUERS, DECEASED, AND IN HIS OWN RIGHT, WILLIAM DEALING, AND CHARITY, HIS WIFE, JACOB FREDERICKS AND JACOB KING, RESPONDENTS.

1. In 1823, T., an habitual drunkard, requested R., at whose store T., was in the habit of buying liquor, to accept a deed for his farm and pay his debts. R. did not consent. Afterwards T., without the knowledge of R., procured a deed from him to R., to be drawn, and executed and acknowledged it, and took it to R. and delivered it to him, and requested him to put it on record, and left it in his hands. R. did not put it on record, but it remained in his hands. On the 20th August, 1831, an instrument was executed by R., by which he, in consideration that T. pay yearly, during his natural life, to R., \$18, granted, bargained, remised, released and confirmed unto T., during his life, the said farm in T.'s possession. After this R. caused the deed to be recorded. T. never saw or heard read the writing of August 20th, 1831. The person who drew this writing testified that, before it was drawn, T. had consented that such a writing should be made, and requested him to keep it in his possession.

2. The deed was declared void. *Semble*, a deed without consideration, from one whose mind has been greatly impaired by excessive and long-continued intemperance, to another from whom he had been in the habit of buying liquor, and who knew of his excess in the use of it, will be set aside.

3. The decree must conform to the bill, and be warranted by it, both in the relief and in the grounds of relief. Relief not embraced in the prayer of the bill cannot be decreed, nor can the relief asked for be granted upon grounds not disclosed by the bill. It is, however, no objection that the case established by the proof is broader and stronger than that stated in the bill, or that

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grounds of relief not contained in the bill are established in evidence, provided the decree is warranted by the charges and the prayer of the bill, and the bill is sustained by the evidence.

This case, and the decision of the Chancellor thereupon, is reported *ante p.* 328.

A. S. Pennington, for the appellants.

A. O. Zabriskie, for the respondents.

GREEN, CHIEF JUSTICE, delivered the opinion of the court.

The first ground of objection to the decree in this cause is, that the case established by the evidence is not disclosed by the pleadings, and that the relief is granted upon a ground not charged by the bill. It is undoubtedly a well-settled rule in equity that the decree must conform to the bill, and be warranted by it, both in the relief and in the grounds of relief. Relief not embraced in the prayer of the bill cannot be decreed, nor can the relief asked for be granted upon grounds not disclosed by the bill. It is, however, no objection that the case established by the proof is broader and stronger than that stated in the bill, or that grounds of relief not contained in the bill are established in evidence, provided the decree is warranted by the charges and prayers of the bill, and the bill sustained by the evidence.

The bill charges that Tuers, having become very intemperate and being exasperated with his wife, and being desirous of securing his estate for the benefit of his own relations, and for the purpose of preventing his wife from inheriting, made a deed of bargain and sale to Ryerson, for his own use. That the deed did not convey the lands to Ryerson, but that the use resulted to Tuers and his heirs. That Ryerson, for a fraudulent purpose, procured the deed to be recorded. That subsequently, knowing that the deed was without consideration and worthless, with the view of rendering it valid and having the lands appropriated to his own use, he conveyed to Garrison.

The bill further charges that the lease from Ryerson to Tuers, if any such existed, was obtained by fraud, and was contrived

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and designed by Ryerson, to procure a recognition of his title, to be used after Tuers' death.

The bill prays that the deed may be declared void and of no effect; that it may also be declared that the use of the land under the deed resulted to Tuers, and that he be decreed to recover.

The *gravamen* of the charge is, that the deed was without consideration and not designed to convey the title, and that the recording of the deed, the execution of the lease and the setting up of title to the lands by Ryerson was fraudulent.

There is no charge in the bill that the deed was obtained by fraud or undue influence or improper means, nor can the decree, in my judgment, whatever may be the weight of the evidence, be sustained upon either of these grounds.

It remains to inquire whether the deed is sustained by the evidence, upon the grounds charged in the bill.

The answer admits that at the date of the deed, and at the time of its delivery, no consideration whatever was paid, or secured or agreed to be paid. It was a voluntary conveyance, executed, acknowledged and delivered by the grantor without the assent or concurrence of the grantee. The defendant explains the transaction by stating that Tuers wished him to accept the deed and pay his debts, but that he did not at first agree to do so; that he received the deed and retained it in his possession from May 1st, 1823, to August 20th, 1831, more than eight years, without claiming title under it; that a new contract was then made, the deed accepted and recorded, a lease given and the title perfected in the defendant. Now this is certainly a very unusual transaction and calls for the closest scrutiny at the hands of the court. Tuers, it is alleged, executes, acknowledges and delivers to Ryerson a deed for his farm for the alleged consideration of \$3000, but without the payment of \$1. The deed is left in Ryerson's custody and under his control. Tuers lies entirely at Ryerson's mercy, exposed at any moment to be turned out of possession, without the least evidence to show what the truth really was, although, as is admitted by the answer, the title was wholly in Tuers. During this period, as appears by the testimony of numerous witnesses, it was reputed in the neighbor-

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hood that Ryerson had title to the place, and Ryerson himself repeatedly declared that he had a deed—as good a deed as any man's.

It is clear, from this evidence, that after the delivery of the original deed, and before 1831, which, as the defendant now alleges, he had no title whatever, it was reputed that he had the title, and that he himself claimed to have the title. It is evident, also, that he then had the same title and the same evidence of title that he now has, except so far as that title may be strengthened by the transactions of 1831.

It is worthy of remark, that during this period of eight years, although Ryerson claimed title, and held in his hands a deed of conveyance from Tuers, that Tuers, both by his acts and words, denied the validity of that deed, and treated the land as his own. On the 8th of February, 1825, four years after the date of the deed to Ryerson, he conveyed more than twenty-one acres—nearly one-fifth of the farm—for a valuable consideration, to Abraham Lake, with covenants of general warranty. In March, 1831, he leased seven or eight acres to John S. Forshee, for fifty years. He told Chester Abby, in the presence of Margaret Lake, that the deed to Ryerson was good for nothing. These acts and declarations of Tuers, occurring during the period when Ryerson, by his answer, admits title in Tuers, are clearly competent evidence. They show that Tuers—notwithstanding the deed held by Ryerson, and his claiming the property—regarded himself as the owner, in fee, of the land, with power to dispose of it at his pleasure, thus giving strong countenance to the charge in the bill that the deed was never designed to pass title.

The deed, then, as originally delivered, was clearly inoperative and void. It so continued until the 20th of August, 1831. Was efficacy given to it by the transactions which then took place between the parties? These transactions, the bill charges, were fraudulent, and I think it is abundantly evident, both from the defendant's answer and the evidence in the cause, that the whole transaction of August, 1831, was colorable, merely, and designed to give support to a deed which, otherwise, was confessedly without consideration, fraudulent, and void. There is no evidence of the circumstances under which this deed was resuscitated,

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save the defendant's answer. And, upon the statement in the answer, it is obvious that Tuers received nothing whatever as a consideration of the conveyance. The alleged consideration was a promise, by the grantee, to pay the grantor's debts. Now, as against the creditors, the deed, being voluntary, would have been fraudulent and void. It was necessary, therefore, that the debts should be paid, in order to legalize the deed. These debts would have been a virtual encumbrance on the land in the hands of Ryerson. He must have paid them, in order to save his title. It was, therefore, a simple conveyance by Tuers to Ryerson, of his whole farm, subject to the payment of his debts, without one dollar of consideration for the conveyance. Nor is it pretended that Ryerson paid the debts at the time of the conveyance, or entered into any binding engagement to pay them, or procured a release to Tuers from them. There is no clause in the deed showing that Ryerson held the land in trust to pay the debts, nor is it pretended that any written engagement to that effect, was given either to Tuers or to the creditors. There appears to have been no witness to the transaction. Tuers, therefore, could not have enforced the contract, nor could the contract have been enforced by the creditors, because, being a promise to pay the debts of a third person, and not in writing, it was void by the statute of frauds and perjuries. The pretended consideration, therefore, was entirely illusory. Ryerson promised nothing—did nothing which, independent of his contract, he was not bound to perform. Tuers received nothing but a nugatory promise. But, admitting that the promise to pay the debts of the grantor when executed, formed a valid consideration for the conveyance, still, the averment of the answer that such promise to pay formed the consideration of the conveyance, is not responsive to the bill, is contradictory of the deed itself, and is entirely unsupported by the evidence. On the contrary, the whole transaction relative to the procurement and execution of the release—or, as it is termed in the answer, the lease—from Ryerson to Tuers, as detailed by Van Dien, the scrivener who drew the paper, and the principal witness for the defence, is utterly irreconcilable with the defendant's answer.

The fact that the recording of the deed and the giving of the

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release were calculated to confirm the title of Ryerson ; that the pretended consideration was neither paid nor secured to be paid at the time of recording the deed ; that the release to Tuers was not placed upon record and that he had no guaranty for his protection but the integrity of Van Dien, who was paid by Ryerson ; that Tuers never saw the lease nor heard it read ; that Ryerson never exercised, in Tuers' presence or under his notice, the privilege reserved by the lease of cutting timber upon the farm ; that from the alleged delivery of the title, until Tuers' death, a period of more than eleven years, Ryerson did not act within Tuers' knowledge manifesting his title ; that Tuers did no act and made no declaration admitting the title, are strongly corroborative of the charges in the bill that the deed was not only without consideration, but that it was never designed to convey title, that it enured to the use of Tuers, and that the claim of title by Ryerson is fraudulent.

Nor ought it to escape notice that this deed was originally given by a man of very intemperate habits to the person who furnished him with the means of vicious indulgence ; that the grantee had no claim of blood or kindred upon the grantor ; that the only alleged consideration was the payment of the grantor's debts ; that there is no evidence of importunity on the part of the creditors ; that the only debts ever paid were paid to Ryerson's own son ; that those debts were contracted years after the original deed was executed, and that they were utterly inadequate to the value of the land.

Upon the evidence in the cause it is apparent that Garrison took his deed from Ryerson with knowledge of the fraud, at least sufficient to put him upon inquiry. He can stand in no better situation than Ryerson himself. He does not, moreover, occupy in equity the position of a *bona fide* purchaser, having parted with no valuable consideration to obtain the title.

It is further objected to the decree that it authorizes an account to be taken against Ryerson of the proceeds of the sale of Tuers' personal property at auction, when it appears by the evidence that after that sale there was a settlement between the parties. It is, perhaps, not certain from the evidence that the settlement was a general one, or that it included the proceeds of

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the auction sales, and if it be so, it can hardly be presumed at this stage of the cause, that the Chancellor will finally decree an account against the appellant for matters which by the evidence appear to be settled, or barred by lapse of time. I think there ought not to be a reversal upon this ground.

In my opinion, the decree should be affirmed, with costs.

The court, (NEVIUS, Justice, and McCARTER, Judge, dissenting,) concurred in this opinion.

Decree affirmed.

COURT OF ERRORS AND APPEALS.

OCTOBER TERM, 1848.

THE BRIDGEWATER COPPER MINING COMPANY, APPELLANTS, AND GOOLD HOYT, RESPONDENT.

1. A bond and mortgage given in fulfillment of a prior written agreement for the sale and purchase of property, at a price stipulated, to be paid in a stipulated manner, with interest, the interest to be paid half yearly, in advance—*held* not to be usurious.

2. A new bond and mortgage were substituted for the first, dispensing with the payment of interest in advance. *Seemle*, that if the first could be held usurious, the contract might, by subsequent agreement of the parties, be freed from the vice.

3. Acts of a subsequent board of directors of a corporation, which were held to be a recognition and sanction of a mortgage given by a former board.

This case is reported *ante p.* 253.

P. D. Vroom, for the appellants.

B. Williamson, for the respondent.

The decree of the Chancellor was unanimously affirmed.

Decree affirmed.

Henry v. Kinnaman.

JOHN HENRY AND RICHARD HENRY, APPELLANTS, AND
ADAM KINNAMAN, RESPONDENT.

In May, 1817, J. purchased land of K. and paid part of the consideration money and gave K. a mortgage on the land for the residue. J. sold parts of the land, and K. released those parts from the mortgage. In August, 1821, judgments were recovered, in favor of other persons, against J., on which executions were issued and levied on that part of the mortgaged premises still held by J., "subject to prior encumbrances." In October, 1822, pending a suit in chancery by K. against J. for the foreclosure of the mortgage, J. and his wife re-conveyed that part of the mortgaged premises which he still held, and which had been levied on as aforesaid, to K., in payment and discharge of the mortgage, and K. took possession of the land; the registry of the mortgage, however, was left uncanceled. Afterwards the sheriff sold, under the said levy, and H. became the purchaser; H. when he so bought, having knowledge of the foregoing facts. *Held*, that H. was entitled to the land free from the mortgage debt.

This case is reported *ante* p. 90.

P. D. Vroom, for the appellants.

W. Halsted, for the respondent

The decree of the Chancellor was reversed.

NEVIUS, Justice, dissented.

Decree reversed.

HENRY COLE, APPELLANT, AND LEWIS E. DAVENPORT AND
CORNELIUS CRAWFORD, JR., ADMINISTRATORS, &c., OF
CALVIN COOK, DECEASED, RESPONDENTS.

An improvident agreement, made for a consideration grossly inadequate, by one of great imbecility of mind, with another whose position in relation to him conferred undue influence and control over him, will be set aside.

This case is reported *ante p.* 522.

A. Gifford and *B. Williamson*, for the appellant.

A. Whitehead and *Samuel Sherwood*, for the respondents.

The decree of the Chancellor was affirmed.

MCCARTER, Judge, dissented.

Decree affirmed.

COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1849.

DANIEL BRAY, APPELLANT, AND MARY ANN BRAY,
RESPONDENT.

Sufficient evidence of adultery on bill for divorce.

This case, and the decision of the Chancellor thereupon, is reported *ante p.* 506.

P. D. Vroom, for the appellant.

No counsel appeared for the respondent.

RANDOLPH, Justice, delivered the opinion of the court.

The complainant asks to be divorced from his wife, on the ground of adultery, stated in the bill to have been committed in his own house, at a particular time, and with an individual named —. It is proved by two witnesses, old Mrs. Bray and her sister, that —, the individual named, came to the complainant's house, in his absence, and remained there all night; that, during evening, some familiarity took place, which elicited reproof from the mother, that defendant retired to bed before the rest of the family, declining to have the company of one of the children, and that —, having formerly worked for the complainant, and being familiar with the house, was permitted to remain up until after the others retired to bed, when he also went up stairs to bed; his room adjoined that of defendant, and their

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doors were near each other. That sometime in the night Mrs. Burdett, (the sister,) being up with the toothache, and hearing a strange and improper noise in defendant's room overhead, she went up to see the cause; it was bright moonlight, and the windows without shutters or curtains, and neither door entirely closed; passing by that of ———, she saw that he was not in the room, but on looking through defendant's door she saw him in bed with defendant, she being or appearing to be asleep. The witness immediately withdrew to her own bed, remarking to her sister that she had seen a sight. No response being given thereto, the sister being asleep when witness left, and we may also infer when she returned, the occurrence was never related until some weeks after, and not until after defendant had left the abode of her husband. If the witness speaks truly and relates what actually took place, complainant is entitled to a divorce, unless the occurrence took place at his instance, or by his procurement, or the whole matter was got up to bring about a divorce. Complainant was gone to New York, and remained all night, according to his usual custom, to dispose of the produce of his farm, and there is no evidence or circumstance going to show that he knew ——— was coming to his house, or that he was there, or that the circumstance itself took place, until weeks after the occurrence. According to the evidence, then he could have been no party to the conspiracy, and if it was got up by others without his participation, it cannot affect his complaint; but there were no others to get it up, except two old women. ——— came to the house in the evening, on an errand, to return a borrowed wagon; he presumed on his acquaintanceship, and remained without other evidence of being invited than being informed where he was to sleep. There is no evidence that he was even invited or in any way induced to come, or that his coming was previously known by either party, or any of the family, or that even the defendant was aware of his coming, or that she had premeditated a plan to create a forfeiture of her dower, without any stipulation agreed on between her and her husband, then there is no evidence that this meeting was brought about by conspiracy or pre-arrangement for any purpose whatever, and if so, there is nothing to defeat the prayer of the bill, unless we disbelieve the evidence of

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the fact. The character of Mrs. Burdett stands before us unimpeached by any witness; her story is confirmed by Mrs. Bray, who testifies that ——— bed was not slept in that night, and by the loose character of the defendant herself. She had married complainant when pregnant by another man, and did not hesitate to tell him and his family that the child born within three months after the marriage was not his; it is also strongly confirmed by the fact that although the bill charges the crime to have been committed with ———, and specifies time and place, all of which is specifically denied by the answer, yet being proved by Mrs. Burdett and Mrs. Bray, defendant neither calls ——— to disprove the charge, or accounts for the absence of his testimony, although she has witnesses sworn to prove much less important matters. We have no right to believe Mrs. Burdett has perjured herself, for there is no evidence to warrant it; she could not have been mistaken, for it was bright moonlight, and her own wakefulness, and the situation of the rooms and the beds, enabled her to speak very positively that in one he was not, in the other he was. True, she did not relate the circumstance immediately, not that night, because it is presumed her companion was asleep, for she does not even testify that she heard her say she had seen a sight, not until after defendant had left the bed and board of her husband, because she thought he would overlook it, as he had defendant's previous conduct, and she did not wish to make difficulty between them. There is nothing unreasonable or imprudent in this; when her information would be beneficial and not injurious, she related it, and not until then. The circumstance neither impeaches her veracity nor proves her mistaken. I think the evidence requires a decree for divorce, and that the decision of the Chancellor should be reversed.

The court, (NEVIUS and OGDEN, Justices, and SCHENCK, Judge, dissenting,) concurred in this opinion.

Decree reversed.

COURT OF ERRORS AND APPEALS.

APRIL TERM, 1849.

NATHANIEL J. CRANE, APPELLANT, AND FRANCIS HEWITT
AND WIFE, RESPONDENTS.

A father devised his estate to a son and two daughters; the son made an agreement with the daughters for a different settlement and disposition of the estate among them, without apprising them of the value of the estate, which was known to him, but not to them; the agreement was, notwithstanding, sustained as a family settlement.

This case is reported *ante p.* 159.

R. Van Arsdale and *P. D. Vroom*, for the appellant.

A. Whitehead, for the respondents.

The decree was reversed, unanimously.

Per tot. cur.

Decree reversed.

COURT OF ERRORS AND APPEALS.

OCTOBER TERM, 1842.

PETER C. ONDERDONK, APPELLANT, AND HIRAM HUTCHINSON, RESPONDENT.

R. had, during the continuance of a partnership between H. and O., loaned money, from time to time, to the firm, for which he charged and received the interest; and had also, from time to time, endorsed notes for the firm, which were paid by the firm. On the dissolution of the partnership, the settlement of its affairs devolved on O., and in an account subsequently presented by him to H., he claimed an allowance of \$500 for R., for endorsing for the firm, and claimed that he and H. had agreed to make the said allowance to R. The court made the allowance.

This case is reported *ante p.* 277.

J. Vandyke, for the appellant.

P. D. Vroom, for the respondent.

OGDEN, Justice, delivered the opinion of the court.

The parties in this suit entered into a co-partnership in the city of New Brunswick, about the 15th of December, 1835, in the india rubber manufacturing business. On the 18th of June, 1840, an agreement for dissolution was executed by them, and a dissolution actually effected on the 24th of December in that year.

On the 30th of June, 1842, Hutchinson filed a bill against Onderdonk, in the Court of Chancery, praying, among other

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things, for an account and for a settlement of their partnership transactions.

Upon the coming in of the answer, a general replication was filed, and, by consent of the parties, a reference was made, on the 6th of April, 1843, to Joseph F. Randolph, Esq., a master of the court, to take the account, with directions, in so doing, to make the parties all just allowances.

The master commenced his duties thereon, upon the 17th of the same month, and, after a laborious examination of their books and of the papers exhibited to him, and of the testimony of witnesses produced by them, he made a report, on the 31st of May, 1843, showing a balance due to Hutchinson, on that day, for principal and interest, of \$113.01.

Both parties excepted to this report, and, in settling those exceptions, the Chancellor, on the 21st of March, 1848, directed that the report should be corrected on both sides; that the sum of \$168.09 should be allowed to Onderdonk for commissions, "by way of compensation for his services in settling the business of the said firm," which claim had been refused by the master, and that \$21.50 of \$43, reported by the master to have been paid by Onderdonk to Hutchinson, and the further sum of \$515, reported by the master to have been paid by Onderdonk to one Peter P. Runyon, as a debt of the firm, should be disallowed, and that the report should be corrected, by adding these sums, less the commissions allowed by him, as above stated, to the amount ascertained by the master to be due to Hutchinson, thereby changing the principal sum to be paid by Onderdonk, from \$113.01 to \$481.42, and decreed that the same should have interest from the third Tuesday of December, 1845.

Onderdonk has appealed to this court, from that decree, and hath set forth, in his petition, that the decree is erroneous, in that it disallowed the sum of \$21.50, as a payment by him to Hutchinson, and also in that it disallowed the sum of \$515, paid by him, on account of the firm, to Peter P. Runyon.

The correctness of the Chancellor's conclusion respecting the allowance, by the master, of \$43, depends entirely upon the manner in which, in taking the accounts, the master charged the appellant.

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It appears, by the bill and answer, that at or about the time of the dissolution of the firm, "an inventory was made out of the claims and demands of the co-partnership," &c., intended to embrace all their claims, demands, and choses in action, and that a copy thereof was set out in a schedule marked A, annexed to the bill of complainant. That such inventory, and the claims and demands and assets, were taken, by the appellant, for the joint use and benefit of the parties. After this arrangement was made, the respondent received, from one or more debtors of the late firm, the sum of \$43, which moneys the master charged to him as so much cash paid by the appellant. If the master charged the appellant *only* with the moneys which he actually received, the Chancellor is right in the correction, but if he charged him with the inventory, the Chancellor has erred.

By reference to the report, we read that the master found that the appellant, subsequent to the dissolution, received of the debts and effects due and belonging to the late firm, the sum of \$5603.13, as per Schedule I more fully appears. "That the said sum embraces all the moneys and effects of the partnership, which came to the hands of the defendant, and all the moneys and effects of the firm for which he should be made accountable. That the Schedule No. I embraces a list of all the accounts and notes specified in the bill, answer, and schedule thereto annexed in the charge filed with the master, and in Exhibit B on the part of the complainant, being a receipt of the defendant for the amount of the notes of the firm taken by him to collect, and also of the moneys of the firm not specified in said schedules and receipts that have been collected by the defendant, as admitted by him or proved by the evidence, except such notes," &c., which exceptions do not touch or affect the question under consideration in this court.

It is evident, from the above explanation by the master of the character of his schedule, that it embraces all the claims due to the firm not specially excepted in the report, and hence, as the appellant was charged *with them* in reaching the balance reported against him, he was entitled to receive the benefit of them. The respondent, having collected \$43 of these claims, should, under the circumstances of the dissolution, either have handed the mo-

ney to the appellant, or have given him credit for the full amount thereof.

Upon this point we are of opinion that the master was correct in considering the \$43 as so much money paid by the appellant to the respondent, and that the Chancellor erred in disturbing that part of the report.

Again. Was the payment claimed by the appellant to have been made by him to Peter P. Runyon rightly allowed to him by the master?

Mr. Runyon was the father-in-law of the appellant, and had been a fast friend of both parties during their connection in business. He had largely endorsed for them, and loaned them moneys, and had otherwise aided in carrying them through the troubles of those difficult times.

Mr. Runyon was examined as a witness by the appellant before the master, and upon his cross-examination he testified, among other things, that he expected some remuneration for his risk, independent of his interest money, if the experiment was successful.

Upon his re-examination-in-chief, he said \$500 *was paid* to him for his risk by the agreement of both parties; and upon further cross-examination he stated that *at first* no specific sum was agreed on for his risk; that the \$500 was agreed on some time during the progress of the dissolution; that *he* offered to take a portion of the profits, or a specified sum, and that the complainant (who is this respondent) said it had better be a specific sum; that witness proposed *this amount*, and it was agreed to; that they agreed to it cheerfully, and particularly the complainant.

With the pleadings in the cause and this testimony before him, the master allowed the appellant a credit of \$500, as due to Mr. Runyon on the 1st of July, 1840, and computed interest upon it to the 1st of January, 1841, to which date Mr. Runyon's account with the firm was made up.

This transaction does not appear to the court in the same light it was viewed by the Chancellor. A competent, intelligent and unimpeached witness has testified that the parties appreciated the services which he had rendered them; that between June 1st,

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and December 24th, 1840, they both agreed that he should have a compensation for those services; that after propositions had passed between them, he named the sum of \$500; that both cheerfully agreed to it, and particularly the respondent, and further that the money had been *paid* to him by the appellant.

We are clearly of opinion that this allowance was rightly made by the master, and that the report in that particular also was erroneously corrected.

The opinion of the court is, that so much of the Chancellor's decree as directs that the sums of \$21.50 and \$515, making together the sum of \$536.50, be added to the amount ascertained by the master to be due to the complainant, be reversed, and that the master's report upon these items be confirmed; and that so much of the said decree as fixes the amount due to the respondent at \$546.40, be also reversed, without costs.

Let the cause be remitted to the court below, to be proceeded in there according to law and the rules of that court.

Per tot. cur.

Decree reversed.

COURT OF ERRORS AND APPEALS.

APRIL TERM, 1850.

WILLIAM KENT, ANDREW C. ARMSTRONG ET AL., APPELLANTS, v. CHARLES M. ARMSTRONG, WILLIAM L. SALTER AND WIFE, ET AL., RESPONDENTS.

A devise to E. R. of all the residue of testatrix's estate, real, personal, and mixed, "to be by her possessed, enjoyed, and occupied, to her, her heirs and assigns, forever," with the proviso "if my said daughter E. R. should die without heirs and intestate," then all the devised estate to vest in her son C. and daughter M., and their heirs, creates a life estate only in E. R., in both real and personal estate, with power of disposal by will and not by deed.

This case is reported *ante* p. 559.

It was argued on the appeal by

I. W. Scudder and *P. D. Vroom*, for the appellants, and

A. S. Pennington and *Wm. Pennington*, for the respondents.

RANDOLPH, Justice, delivered the opinion of the court.

Margaret Armstrong made and duly executed her last will and testament, by which, after disposing of her plate to her four children, giving her husband a life estate in her house and lot in Elizabethtown, if he remained unmarried and occupied the same as a residence, but at his death, or when he should cease to comply with the conditions of the will, his devise was to become null and void, and the house and lot and all the furniture therein ex-

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cept the plate, is to become the absolute property of her daughter Eliza Rosetta, "to be taken and held *under the like restrictions, limitations, and conditions as the property hereinafter bequeathed to her.*"

The testatrix then gives rings to each of her children as tokens of affection, and regretting her inability to provide more amply for them, but consoling herself that Edward and Margaret are in easy circumstances, and that Charles has the disposition and ability to provide for himself, she gives and bequeaths all the rest and residue of her estates, real, personal, and mixed, (subject to her husband's life interest in some part thereof,) to her daughter Eliza Rosetta, "to be by her possessed, enjoyed, and occupied, to her, her heirs and assigns forever," with the proviso, "but if my said daughter Eliza should die without heirs and intestate, then my will is that all the estate hereinabove devised to her shall vest in my son Charles M. Armstrong, and my daughter Margaret Salter and their heirs, to be divided between them, share and share alike."

The question for our consideration under this will is, what interest or estate did Eliza Rosetta take in the real and personal property of her mother?

In the construction of wills, the primary and important inquiry is to ascertain the intention of the testator; indeed, pretty much all the rules for construing wills and devises are based upon what is the apparent or the presumed intention of the testator, and if that appears to be clear and not in violation of any established principle of law, that intention is to govern without further inquiry or regard to mere technical terms. 2 *P. Wm.* 741; *Doug.* 431; 4 *Vesey* 51. And in tender regard for the supposed situation of a testator, the law regards his acts with extreme indulgence, and without the presumptions which are raised against the grantor or the grantee of an estate. But in order as far as possible to sustain a uniformity in construing wills, courts, on the general presumption that such was the intention of testators, have settled the meaning of certain terms and principles as applicable alike to all wills wherein they occur or arise, and are not obviated by other matters. Thus the term "die without issue," standing uninfluenced by other parts of the will,

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is construed to mean an indefinite failure of issue, that is, a failure, not on the death of the first taker, but a failure when all his issue or descendants shall cease, and this rule is on the presumption that, by "issue," the deviser means all the children and their descendants of his devisee.

What, then, was the intention of the testatrix in this will? What estate did she intend to give to her daughter Eliza Rosetta, and what over to her son Charles and daughter Margaret Salter?

In the first place, it is to become the absolute property of Eliza Rosetta, and to be to her and her heirs forever. Either of these terms alone would convey a fee simple, but this is not intended, for both are connected with the proviso that, "if my said daughter Eliza Rosetta should die without heirs, and intestate," then all the estate should go over to or vest in Charles and Margaret. Now, what was the object of inserting this proviso? Manifestly, in some way to limit the absolute interest and fee simple previously given to Eliza Rosetta. But how limit? She was the particular object of her mother's bounty, and to her and her children, if she had any, this absolute estate was to be given. But she was not the only object of the mother's solicitude. She had other children who needed her aid, and she intended that her son Charles and daughter Margaret should have the estate, if her first devisee failed. Consistent with this special interest for Charles and Margaret, she intended that Eliza should have the whole estate or interest, be it what it may; it was to be possessed, enjoyed, and occupied by her for life, or, at will, to go to her children, if she had any, in such way as the mother, by will, should appoint, or as should arise under the devise. And this power of appointment, whether intentional or otherwise, by the generality of the words used, would extend to the sister and brothers, or to any others whom Eliza, by will, should designate. But Eliza might die without children, and without will or appointment by will. In that case, could it even have entered into the contemplation of the mother, whose "deepfelt regret" is expressed in the will, that she could not provide more amply for the other children, that she was giving Eliza an absolute interest in the estate, which she might convey by deed, and thus prevent its ever

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vesting in Charles and Margaret. The intention on the face of the will is, palpably, that Eliza was to take only such estate, and have such right and power only as that the property should go over to Charles and Margaret in case of failure in the first devise. The only difficulty is, whether she has made use of such terms as will enable the court to carry out that intention without violating the settled principles of law.

“Die without heirs” is to be construed as the counsel conceded it to mean, without issue. *Cro. Jac.* 415; 3 *Lev.* 70; 1 *P. Wm.* 23; 2 *Saund. R.* 288, *a, b.*

The qualification thus understood would imply an indefinite failure of issue, (3 *Halst.* 39; *Spencer* 6; 4 *Kent* 273,) and, without other qualification or annexation, would reduce the previously given absolute estate of Eliza to an estate in fee tail in the realty, with a contingent remainder to Charles and Margaret. A devise to A B and his heirs, and if he die without issue, then to C in fee, being equivalent to a devise to A B and the heirs of his body, which is a fee tail at common law, or, under our statute, an estate for life. This would not, however, affect the personal property, as that cannot, unless under very special circumstances, be limited over after an indefinite failure of issue. It would, therefore, still remain the absolute property of Eliza. *Forth v. Chapman*, 1 *P. Wm.* 666; *Ib.* 564; 3 *Atk.* 288; 2 *Ib.* 88 (1); 2 *T. R.* 720; 4 *Kent* 275 (*a*); 11 *Wend.* 260.

But to the qualification, “die without heirs,” the testatrix has added the words, “and intestate,” and the whole case turns upon these two words, for Eliza Rosetta conveyed the real estate by deed, and afterwards died without issue, and intestate. What effect have these words on the estate, the qualification thereof, or both?

There is a class of cases in which the doctrine is well settled, that when the will gives to the first taker an absolute power of alienation and disposal in express terms, or by necessary implication, he takes the absolute estate or fee simple, and the executory devise over is void as contrary thereto. Thus, in the *Att’y-Gen. v. Hall, Fitzg.* 314, real and personal estate was given to the son, and if he die without issue, then what he should be possessed of at his death was given over to the Goldsmith’s Company, of

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London; it was held that the term, "*what he should die possessed of*," implied an absolute power of selling or disposal of the whole, which gave the first taker the whole estate, and there was nothing to devise over. So in *Ide v. Ide*, 5 Mass. 500, what estate he shall leave is devised over, which Parsons, C. J., says shows that it was the intention of the testator that the devisee should have an unqualified power of disposal of the estate at his pleasure, which implied a fee simple, and left nothing on which the executory devise could operate. So in *Jackson v. Bull*, 10 Johns. R. 19, there was a devise to M. in fee, and if he died without issue the said property he died possessed of was given over to another, held for the same reason that M. took a fee, and the devise over was void. So also in *Jackson v. Delaney*, 11 Johns. R. 365, and 13 *Ib.* 537, and in *Jackson v. Robbins*, 15 *Ib.* 167, and in the same case in error, 16 *Ib.* 537. The cases arose under the will of Lord Stirling, of this state, by which he gave all his estates to B., his wife, her executors, administrators or assigns, but in case of her death without giving, devising or bequeathing by will or otherwise, selling or assigning the said estate, or any part thereof, then the same, or such part as was undisposed of, was given over to his daughter, Lady Catharine Duer. It was held that the wife took the entire estate, and the devise over was void, though there were other points in the case which destroyed the plaintiff's right of action. Chancellor Kent, in delivering the opinion of the Court of Errors, takes occasion to remark, that when an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is when the testator gives the first taker *an estate for life only by certain or express words, and annexes to it a power of disposal.*

The extent of the rule was not involved in the case of *Jackson v. Robbins*, or in any of the cases referred to, and the remarks, therefore, and distinction of the learned Chancellor were not required in the decision of the case, for in these cases the effect of the power controverted was full and absolute to the disposal of the whole estate by devising, selling, assigning or otherwise. And the authorities referred to on this point do not necessarily create such distinction, though they very clearly estab-

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lish the rule that when an estate for life is given by will, with a power of disposal, then the devisee has but an estate for life, with a power which does not enlarge the estate. The cases are of express devises for life, with power of disposal, and are distinguished from mere naked powers to executors or others to sell or convey; but if an estate for life is created in the first instance, with the power of disposal, it is of no consequence whether the life estate be created by express words or necessary implication or construction of the will. The same reasoning will apply to both, and of course the same rule should also. *Tomlinson v. Dyton*, 1 *Salk.* 239; 1 *P. Wm.* 149; 2 *Cox* 396; 10 *Vesey* 370; 2 *Wils.* 6; see also 1 *Sugden on Powers* 119, 120, where the matter is fully discussed and cases cited.

Having shown the two classes of cases, viz., where a general and absolute power of disposal is given to the devisee, which create a fee simple, or when a life estate is given with a mere power of appointment or disposal to particular persons, or in a particular way, the question arises to which, if either, does the devise in this case to Eliza Rosetta belong? Here is no general and absolute power of disposal given in the will, either expressly or by implication, but the words can only imply a power to dispose of by will; and so, too, here is no life estate given by express terms, and can only arise, if at all, by fair construction of the will. Retaining in view, then, the manifest intention of the testatrix, what is the legal construction to be placed upon this devise and bequest. She first gives an absolute interest and fee simple, then adds the restriction, "*die without heirs*," by which the fee is reduced to an estate tail, with a contingent remainder, and to this restriction is added the words "*and intestate*." And then the inquiry arises, what effect are these words to have upon the restriction or the estate? Confined to the restriction, they merely change what was before an indefinite failure of issue to a definite failure upon the death of the first devisee, and so make the estate given to Eliza Rosetta either by the original devise of the fee simple and absolute interest, or by the general and absolute power of disposal, as insisted by counsel, implied by the words "*and intestate*," an absolute estate in fee simple, and the executory devise over to Charles and Margaret void.

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No American authority has been cited or found which fully meets the question as it stands here and takes this view of it, and no English case to that effect has been adduced, except two of very recent date, and of no further authority in this court than what is due to the opinion of the judges who pronounced them, and the learning and reasoning by which they are sustained. All the cases except these two show an absolute power of disposal either expressly or by necessary implication, and we have seen that this class of cases of necessity creates a fee simple. But it has been before shown that you may create a life estate with a special power of appointment or devise over without this consequence following, because there is no general and absolute power of disposal given. The first of the two cases referred to is that of *Cuthbert v. Perrine*, 1 *Jac. C. R.* 441, which was a bequest to A to be paid at the age of 21, and if he died under age, or after that period without heirs and intestate, then over; and it was held that A took an absolute interest on arriving at the age of 21 years. This case belongs to a distinct class, different from the one under consideration, viz., when dying without issue is connected with the collateral contingency having reference to the age of the first taker, which is construed to mean a definite failure of issue, and to create an absolute estate in the first taker. *Lewis on Perpet.* 228; 1 *Powell on Dev., by Janvin*, 187, 8; 2 *Ib.* 573, 9; and also *Den v. Taylor & Shepherd*, 2 *South.* 413; which is very nearly this case. A devise to S. in fee, but if he die before he arrive at lawful age or has lawful issue, then over, was held to be a definite failure of issue, and created a fee in S. See also 1 *Taunton* 174; and 3 *Bing.* 13. It thus appears that there is sufficient in the case of *Cuthbert v. Perrine* to create precisely the interest decided by Sir T. Plummer to have been bequeathed, without reference to the words "intestate," or requiring a construction thereon.

The other case relied on is that of *Green v. Harvey*, 1 *Harv.* 428. The volume of reports embracing this case, has not been re-published in this country, and the only book in which I have been able to find any account of it is in *Lewis on Perpetuities* 230. It was a bequest of household property to a son, "and should he die without heir or will," then over, and it was held

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that the son took an absolute interest, the gift over on the contingency of the legatee's not making a will being held void. The case is certainly in point; but that the force of the decision is somewhat impaired, if not questioned, even in England, we have but to quote from the author just cited in introducing the case. "A gift to take effect in the event of a person not exercising the power of disposition incident to the property or ownership which the testator or donor has vested in him is void; and if such a contingency cannot be contemplated, it is difficult to conceive what influence the mention of it can have on words importing a failure of issue, *which ought, in that case, to be read independently of such void collateral contingency.*"

How far this view may have influenced the mind and opinion of Sir J. Wigram, V. C., it is impossible to say, for, the case being one of personalty only, if the words "*or will*," and the "*void contingency*" were stricken out, the result of the case must have been the same.

According to the cases heretofore cited, "*die without issue*" created an estate tail in real estate and an absolute interest in a chattel or legacy. The same suggestions will apply, if it were necessary thus to appropriate them to the force of the word "*intestate*," in *Cuthbert v. Perrine*; and if we make the same application to the devise now under consideration, and strike out the void contingency "*and intestate*," the language of the will would create an estate tail, (a life interest under our statute) in Eliza Rosetta, in the real estate, with a contingent remainder in Charles and Margaret, and in the personalty an absolute interest in Eliza. But it is conceived that we have no right to strike out the words "*and intestate*" as a void contingency, because it is a well-settled principle in the construction of wills that, if it be possible, all the words in a devise or bequest are to be taken into consideration, and to have awarded to them their full import and meaning. 6 *Cruise* 171, 2; 2 *Barr* 770; 2 *P. Wm.* 282; 3 *Yates* 187; 4 *Mass.* 208.

And, in this respect, the reasoning, or rather the "impression" of Sir T. Plummer, in the case before cited, is considered defective; it is that the limitation over is not good, because "the absolute property is first given with the power of disposal as a con-

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sequence, and then it is given over if he die intestate." The word intestate is used by the learned master to determine the failure of issue to be definite and then stricken out, without being permitted to operate upon the nature of the interest bequeathed, to determine its character, but in lieu thereof the power of disposal and the character of the interest are assumed from the first bequest, without taking into consideration the contingency connected therewith or the qualification annexed to that; so in the case now under consideration, the word intestate is used to change an indefinite failure of issue to that of a definite character, and then it is thrown aside without being permitted to operate on the character of the estate, but without its influence from the power given to the devisee to possess, enjoy and occupy the property for herself and her heirs forever, subject to the restrictions, limitations and conditions of the will, an absolute interest is assumed, or else if the word is retained and suffered to operate at all, it is merely to neutralize the qualification of the estate "die without issue" and render the whole proviso nugatory, so that the construction is to be precisely as if the testatrix had bequeathed an absolute interest and estate in fee simple without any "restrictions, conditions or limitations" whatever.

Now it is utterly impossible, from the face of this will, that either law or reason can presume any such intention on the part of the testatrix. The qualification and the addition were annexed to the devise to limit what would have otherwise been an absolute interest, and we have no right to make one defeat the other, unless some imperative rule of law requires it. But we have seen that an estate may be devised to one for life with a power to appoint or devise it over in fee. Adopting this as the construction, we make every part of this will harmonize and every clause and word operative, and give full effect to the intention of the testatrix. We give to the favorite daughter all the interest and estate which she can or was intended to have, preserve the interest from going into the hands of strangers and protect the devise over to the two other children. Cases are not uniform in England; slight circumstances of intention will often create a wide variance in the result. In *Beachcroft v. Broome*, 4 T. R. 441, under the words died without having settled, or other-

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wise disposed of the estate so devised, or without issue of the body, then over, Lord Kenyon held the devise over good, as an executory devise; and in *Doe v. Reeves*, 7 *T. R.* 277, a devise to A. and her heirs, and if she die without issue, then A. to dispose of the whole by will or any other instrument in writing, attested by three witnesses as she should direct, limit or appoint, and for want of such issue and direction, then over in fee, the King's Bench held the devise over good, as a contingent remainder. In *Wright v. Atkins*, 17 *Vesey* 255, and 19 *Ib.* 299, a devise to a wife and her heirs in the fullest confidence that after her decease she will devise the property to — family, it was held that the wife took an estate for life with remainder over in trust. In *Mifflin v. Mifflin*, 6 *S. & R.* 460, the Supreme Court of Pennsylvania held that a bequest to two sons, and if either die without will or lawful issue, then such, &c., over to the survivor and his heirs, gave a life estate to the legatee and an executory devise over. On the death of one, his executors took the interest due, and the principal passed over to the survivor. And in *Boyd's Heirs v. Bingham*, 4 *Barr* 102, the same court held that in a devise of all real and personal estate to a wife, her heirs and assigns forever, and to will the same to whom she pleases, on condition that she remains my widow, and in case of her marriage or death without a will, a devise over to other persons, the estate of the wife was held but a life interest, and that the devise over was good; and although the wife remained unmarried and conveyed the estate by deed to R. B., and subsequently by will bequeathed the proceeds of the estate to R. B., yet the devise over was good, and the power to dispose of the property by will was not executed by conveying the same by deed and bequeathing the proceeds by will. The opinion of the court in this case by Chief Justice Gibson, placed the matter principally on the ground of intention; had his strong and lucid mind investigated the cases on the subject, his opinion would have been of more force and saved much labor in the present cause.

In *Doe v. Howland*, 8 *Cowen* 284, Savage, C. J., in delivering the opinion of the court, says, "It is undoubtedly true that a devise with power to convey a fee, carries a fee, though a devise

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with power to devise in fee carries but a life estate." The remark was not essential to decide the cause, and so it is left to stand unsupported by reasoning or authority, yet whoever will consider the positions and examine the cases fully will find it difficult to come to a contrary conclusion. The first proposition is correct, because the power to convey in fee is a fee itself, and not a mere power; it is that which you cannot separate from a fee, being the absolute power or right of disposal in any way; but the power to devise in fee is a very different matter; not being itself a fee, but merely one of the attributes of a fee, it is a mere power and does not constitute a fee in the first devisee, as a power or right of general conveyance or disposal does, consequently the first devisee takes but an estate for life with a power; and no case of a devise contrary to this has been shown or discovered by the court.

When the power is to be executed by will it cannot be done by deed or otherwise. *Boyd's Heirs v. Bingham*, before cited, 8 T. R. 57; 2 East 481.

It is said that an executory devise is indestructible; that it cannot be barred or destroyed by the holder of the preceding estate. Now this rule only means that the first taker, as a general rule, cannot create a greater estate than he has; having a defeasible estate he cannot create an indefeasible one; he can do no act to prevent the vesting of the devise on the happening of the contingency, but he may prevent that occurrence. Mr. Fearne's rule, as to the indestructibility of the devise by the holder of the preceding estate, does not apply, because the former does not proceed out of the latter, but is an independent estate. *Fearne Ex. Dev.* 418. And so is not indestructible by destroying the contingency, or *vice versa*. Thus the executory devise upon dying without a will is good; but if a will be made, the contingency is destroyed and so is the devise.

An executory devise may be so limited after an estate tail, and yet the tenant in tail may convey the estate by fine or recovery, and thus destroy the devise over. 16 Johns. R. 539; *Powell on Dev.*, by Janvin, 246; *Jarman on Wills* 664; *Cro. Jac.* 592; *Fearne*, by Pow., 18.

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The only question left for our consideration is, whether the same doctrine applies to personal, that has been advanced as to real property. Where a fee-tail is created by will, the law, as before stated, creates a distinction between the real and personal estate, on the ground that it will not presume that the testator intended to limit personal property on an indefinite failure of issue, and, therefore, as to such property, is construed that the legatee under such a limitation has the absolute interest. But an executory devise only applies where the terms used imply a definite failure of issue, and of course the above distinction does not apply, but both real and personal property can and do go over on such definite failure of issue by way of executory devise. *Hull v. Eddy*, 2 *Green* 175; 16 *Johns. R.* 565, 584; 1 *Jarman on Wills* 793, (n. 2.)

We come, then, to the conclusion that in the real and personal property devised and bequeathed to Eliza Rosetta by the will of her mother, subject to the limitations therein expressed, she takes a life estate only, with a power of appointment or disposition by will; and that in the event of her dying without issue and intestate, the executory devise over vested in her brother Charles and sister Margaret, and that they, therefore, are entitled to all the principal of the estate, which, of course, does not include interest, dividends, or rents and profits due at the death of Eliza; they go to her personal representatives.

The deed executed by Margaret Salter, Charles and Edward Armstrong, and the marriage settlement entered into between Eliza Rosetta and her future husband, and Judge Kent, can in no way alter the above conclusion. The former only operates in confirmance of the power of their mother to execute a will under her marriage settlement, and the latter only on the property which Eliza Rosetta had a right to convey or absolutely control.

I am, therefore, of opinion that the decree below must be reversed and a decree entered in favor of the complainants, in accordance with the foregoing principles and conclusions.

In this opinion, WALL, SPEER and McCARTER, Judges, concurred.

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OGDEN, Justice, and PORTER and SCHENCK, Judges, dissented.

Decree reversed.

NOTE.—Chancellor H., considering the questions involved in this case proper for the law courts to decide, and having given an opinion on the will when at the bar, referred it to the Supreme Court, and gave no opinion in the Court of Chancery, or the Court of Errors and Appeals. REPORTER.

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2. A father devised his estate to a son and two daughters; the son made an agreement with the daughters for a different settlement and disposi-

tion of the estate among them, without appraising them of the value of the estate, which was known to him but not to them; the agreement was, not withstanding, sustained as a family settlement. *Crane v. Hewitt*, 631

[No written opinion having been delivered in the Court of Errors and Appeals, or furnished subsequently to the reporter, he is not able to give the reasons for reversal in this case. —G. B. H.]

3. R. had, during the continuance of a partnership between H. and O., loaned money from time to time to the firm, for which he charged and received interest; and had also from time to time endorsed notes for the firm, which were paid by the firm. On the dissolution of the partnership, the settlement of its affairs devolved on O.; and in an account subsequently presented by O. to H., O. claimed an allowance of \$500 for R. for endorsing for the firm, and claimed that he and H. had agreed to make the said allowance to R. The court made the allowance. *Onderdonk v. Hutchinson*, 632

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I.

INTEMPERANCE.

1. In 1823, T., an habitual drunkard, requested R., at whose store T. was in the habit of buying liquor, to accept a deed for his farm and pay his debts. R. did not consent. Afterwards, T., without the knowledge of R., procured a deed from him to R. to be drawn, and executed and acknowledged it, and took it to R. and delivered it to him and requested him to put it on record, and left it in his hands. R. did not put it on record, but it remained in his hands. On the 20th of August, 1831, an instrument was executed by R. by which he, in consideration that T. pay yearly, during his natural life, to R. \$18, granted, bargained, remised, released and confirmed unto T., during his natural life, the said farm in T.'s possession. After this, R. caused the deed to be recorded. T. never saw or heard read the writing of August 20th, 1831. The person who drew this writing testified that before it was drawn, T. had consented that such a writing should be made, and requested him to keep it in his possession. The deed was declared void. *Ryerson v. Adams*, 618

2. *Scmble*. A deed without consideration from one whose mind has been greatly impaired by excessive and long continued intemperance, to another from whom he had been in the habit of buying liquor and who knew of his excess in the use of it, will be set aside. *Ib.*

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The statute of limitations of New Jersey, (*Rev. L.* 411, § 10; *Rev. Stat.* 95, § 11,) applies to the action of

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In May, 1817, J. purchased land of K. and paid part of the consideration money, and gave K. a mortgage on the land for the residue. J. sold parts of the land, and K. released those parts from the mortgage. In August, 1821, judgments were recovered, in favor of other persons, against J., on which executions were issued and levied on that part of the mortgaged premises still held by J., "subject to prior encumbrances."

In October, 1822, pending a suit in chancery by K. against J., for the foreclosure of the mortgage, J. and his wife re-conveyed that part of the mortgaged premises which J. still held, and which had been levied on as aforesaid, to K., in payment and discharge of the mortgage, and K. took possession of the land; the registry of the mortgage, however, was left uncanceled. Afterwards, the sheriff sold, under the said levy, and H. became the purchaser; H., when he so bought, having knowledge of the foregoing facts. *Held* that H. was entitled to the land free from the mortgage debt. *Henry v. Kinnaman*, 626

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2. A paper purporting to be a certified copy of an order and of the signature of the Chancellor thereto, for the examination of the defendant in a suit, was sent by the clerk to the solicitor of the defendants, but by some oversight the original draft of the order had not been presented to the Chancellor for his signature. *Held* that the court might receive the testimony if the party examined was not interested. *Ib.*

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them, must apprise the daughters of its value, of their rights, and of every circumstance necessary to enable them to treat upon terms of equality; and concealment, misrepresentation, or any conduct on his part calculated to put them at a disadvantage in the negotiation, will be fatal to the contract in a court of equity. *Hewitt v. Crane*, 159

2. Courts of equity look with favorable eye on agreements made to preserve and maintain the peace of families; but only so far as such agreements are fairly obtained. If obtained by concealment or misrepresentation as to the value of the estate, courts of equity will not sustain them. *Ib.*

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2. A notice of a motion to dissolve an injunction "for irregularity in the proceedings" is insufficient. The notice should state the irregularity. *Miller v. Traphagan*, 200

3. On motion to dissolve an injunction, affidavits, in support of the injunction, to contradict matters in the answer alleged to be irresponsible to the bill cannot be read if the defendant's counsel disclaim and waive reliance on any irresponsible matter. *Miller and others, Trustees, &c., v. English*. 304

4. In August, 1844, B. recovered a judgment against Y., who was then seized of certain lands. On the 6th of January, 1845, Y. conveyed an undivided half of said lands to L. On the 14th of January, 1845, Y. confessed a judgment to L., upon which an execution was immediately issued and levied upon all the right of Y. in the said lands. On the 9th of August, 1845, execution was issued on B.'s judgment and levied on all the said lands. An injunction was allowed, restraining the sheriff from selling under the judgment confessed to L. the undivided half which had been conveyed to him prior to the entry of his judgment. *Oakley v. Young*, 453

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6. On bill by one in possession of land, for the specific performance of an alleged agreement by the defendant to purchase the land at sheriff's sale, on execution against the complainant, and take a mortgage for the amount advanced by him to pay encumbrances, an injunction to restrain proceedings at law to recover possession from the complainant will not be retained until the hearing, if the amount due is large in proportion to the value of the land and the responsibility of the complainant is comparatively limited. 16.

7. A gave a mortgage to B, and died leaving a will, of which he appointed four executors. C, claiming the mortgage through an assignment by the executors to one of themselves, and an assignment by him, for his own purposes, to an assignee in trust for a company, and an assignment by said trustee to C, filed a bill of foreclosure on the mortgage and obtained a decree for sale. The property was sold by the sheriff and bought by D, who paid the purchase money to the sheriff and received a deed. Before the sheriff paid over the money, D filed a bill, stating that the alleged assignment by the executors of A to one of themselves was void; that one of the said executors alleges that his name appearing to the said assignment is forged, and that the said mortgage is a part of the assets of the estate of A; that the executors of A were not made parties to the foreclosure bill; that one of the said executors had given notice to the clerk of Hudson not to permit the cancellation of the said mortgage, and praying that the parties claiming the said mortgage and the proceeds thereof, may interplead; and that the sheriff may be enjoined from paying the money to either of them, and may be ordered to pay it into court to abide, &c. The orders prayed were allowed, and a motion, without answer, to vacate them was denied. *Herrick v. Mann*, 460
8. Injunction allowed restraining waste on a farm conveyed by the complainant to the defendant, on bill alleging that a deed for the farm was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance, and praying that the deed may be declared void. And on answer and motion to dissolve, the injunction was retained until the hearing of the cause. *Staats v. Freeman*, 490
9. The bill stated that, in January, 1842, H. V. and J. V. in consideration of \$10,000, conveyed to the complainant a farm; that the agreement for the sale had been concluded some days prior to the execution of the deed; that the deed was recorded a few days after its delivery. That at the delivery of the deed the complainant was ignorant of the existence of a judgment in favor of the defendant in the bill against the said H. V. and J. V., or that the defendant held a judgment bond against them. That the object of H. V. and J. V. in selling said farm was to raise money to pay their creditors, of whom the defendant was one; and that the said money was duly applied in the payment of their debts. That during the negotiation for the said purchase by the complainant, the defendant was acquainted with the whole matter, and was told by H. V. of the intended sale to the complainant, and advised the making thereof, and knew that the complainant was buying the property, supposing it to be clear of any judgment in his favor; but that the defendant, after said agreement of purchase and sale had been made, and on the 19th of January, 1842, had a judgment entered up on a judgment bond he held against said H. V. and J. V. That the said H. V. and J. V. had ample real estate remaining in them after the said sale to satisfy the defendant's judgment, but that he released the same, or large portions thereof, from the lien of said judgment. That the defendant, before the said sale, held two judgments against the said H. V. and J. V., which had been assigned to him, and that, on the 7th of December, 1842, they transferred to him a draft for \$6,000, drawn upon and accepted by certain persons in Kentucky, as collateral security, for the payment of his said two last mentioned judgments, amounting to about \$5,000, the defendant agreeing, under hand and seal, to apply what he should receive on the said draft—first, to the payment of his said two last mentioned judgments, and to account for the surplus. That the defendant received on the said draft \$5,287.52, and did not apply the same on his said two judgments, but raised the amount of said judgments by sales on execution, and now insists on appropriating said money to judgments entered since the said deed to the complainant, and which

the defendant holds against the said H. V. and J. V., leaving older judgments unpaid, and thereby charging the complainant's farm with the amount thereof. And that the defendant has caused an execution issued on his said judgment of January, 19th, 1842, to be levied upon the complainant's said farm. The bill prayed relief, and an injunction restraining sale on the last mentioned execution. The injunction was allowed. An answer was put in, and a motion thereupon made to dissolve the injunction. The injunction was retained until the hearing. *Van Mater v. Holmes*, 575

10. P., owning two-thirds of a patent right, filed a bill against K., to whom he had sold the other third, to compel the performance of an alleged agreement between them, by which K. bound himself to discontinue the manufacturing under the patent, when he should have made enough out of the profits of the business to re-imburse him certain advances he had made for commencing the manufacture; the bill alleging that he had made enough to re-imburse his advances. The bill prayed that K. might be decreed to discontinue, and prayed an injunction restraining K. from manufacturing. K., by his answer, read as an affidavit in opposition to the motion for an injunction, denied that he had yet re-imbursed himself; and also denied that he was manufacturing under the patent, and claimed that the article he was manufacturing was not within the patent, but a different article. The injunction was denied. *Parkhurst v. Kinsman*, 600

Vide CREDITOR'S BILL, 1.
TRUST AND TRUSTEE, 6, 7.
MORTGAGE, 2, 4, 10.
SPECIFIC PERFORMANCE, 5.
PARTNERSHIP, 1, 2.
WASTE, 1.

INSTALLMENTS.

Vide MORTGAGE, 2.

INTEMPERANCE.

1. In 1823, T., an habitual drunkard, requested R., at whose store T. was in the habit of buying liquor, to accept a deed for his farm and pay his debts. R. did not consent. Afterwards, T., without the knowledge of R., procured a deed from him to R. to be drawn, and executed and acknowledged it, and took it to R. and delivered it to him, and requested him to put it on record, and left it in his hands. R. did not put it on record, but it remained in his hands. On the 20th of August, 1831, an instrument was executed by R. by which he, in consideration that T. pay yearly, during his natural life, to R., \$18, granted, bargained, remised, released and confirmed unto T., during his life, the said farm, in T.'s possession. After this, R. caused the deed to be recorded. T. never saw or heard read the writing of August 20th, 1831. The person who drew this writing testified that before it was drawn, T. had consented that such a writing should be made, and requested him to keep it in his possession. The deed was declared void. *Adams v. Ryerson*, 323

2. *Semble*. A deed without consideration from one whose mind has been greatly impaired by excessive and long continued intemperance, to another from whom he had been in the habit of buying liquor, and who knew of his excess in the use of it, will be set aside. *Id.*

INTERPLEADER, (BILL OF.)

Vide PLEADINGS—BILL, 1.

J.

JUDGMENT CONFESSED.

The bill, filed by B., charged that the judgment confessed to L. was collusively confessed and taken for the purpose of defeating his prior judgment, and of protecting Y.'s property from his creditors, and prayed that B.'s judgment might be de-

clared the prior lien. A demurrer to the bill was overruled. *Oakley v. Young et al.*, 453

Vide INJUNCTION, 4.

COURT OF ERRORS AND APPEALS—SHERIFF'S SALE, 1.

JURISDICTION.

A court of equity may decree the cancellation of an instrument or agreement though it has become a nullity, on the ground that its existence may be a cloud on a party's title, or may subject him to litigation at a future period, when the facts may have become involved in obscurity. *Stevens v. Ryerson*, 477

L.

LAPSE OF TIME.

After 23 years from the taking of a decree *pro confesso* on an original bill against all the defendants therein except one, and 22 years after that one had answered the original bill, no step having been taken in the meantime in the original suit, a supplemental bill was filed against some of the defendants to the original bill, and against other persons who had become assignees of others of said defendants since the decree *pro confesso* was taken. A demurrer to the supplemental bill was allowed. *Executors of Woodruff v. Brugh*, 465

LEGACY, (ABATEMENT OF.)

Vide WILL, 7.

LIMITATIONS, (STATUTE OF.)

The statutes of New Jersey limiting actions for land do not apply to dower. *Wright v. Conover*, 482

Vide COURT OF ERRORS AND APPEALS—LIMITATIONS, STATUTE OF, 1.

M.

MORTGAGE.

I.—Of the Mortgage Generally.

1. When a mortgage is foreclosed for default of payment of an installment, the residue of the money not being due, the whole premises will not be directed to be sold unless a necessity for such a course exists; and when, in such case, a decree has been entered for the sale of the whole premises, the court will, in its discretion, regulate the process of execution under the decree. *American Life and Fire Insurance and Trust Co. v. Ryerson*, 9

2. A borrowed money of B, on an agreement making it payable in installments, and gave his notes for the payment of the installments, and a decree in this court against A was assigned to B as collateral security for the payment of the notes. The decree assigned was general, that the mortgaged premises be sold to pay the whole sum mentioned in the decree, and that a *fi. fa.* issue for the sale of so much of the mortgaged premises as would be sufficient to pay the said sum. The mortgaged premises were manifestly divisible. An installment having become due, the sheriff was about to sell under the decree, to raise the whole sum. He was restrained by order of the court. And subsequently, on motion to vacate the order, it was held that the decree could be used only so far, and at such times, as should be necessary to enforce the performance of the principal agreement (the agreement on which the money was borrowed and the notes given,) and in the same way as if the court had been asked to direct process of execution, on the decree, in view of the principal agreement. The motion to vacate the order was denied, and a sale was directed of so much of the mortgaged premises as would be sufficient to pay the installment which had become due. 16

3. When a mortgagor, after giving the mortgage, sells to a third person a part of the mortgaged premises, the

- part remaining in the mortgagor should, in a decree for sale, be directed to be sold first. *Winters v. Henderson*, 31
4. On a foreclosure bill in such a case, a decree was taken in the general form for the sale of so much of the mortgaged premises as would be sufficient to pay the debt, and a *fi. fa.* was issued to the sheriff, commanding him, in the terms of the decree, to make sale. On the petition of one of the defendants, a purchaser from the mortgagor of a part of the premises, and the facts therein stated, an injunction was allowed restraining the sheriff from selling the part which had been conveyed to this defendant, until the further order of the court; and it was subsequently directed that the part remaining in the mortgagor should be first sold. *Ib.*
5. In May, 1817, J. purchased land of K. and paid part of the consideration money, and gave K. a mortgage on the land for the residue. J. sold parts of the land, and K. released those parts from the mortgage. In August, 1821, judgments were recovered, in favor of other persons, against J., on which executions were issued and levied on that part of the mortgaged premises still held by J., "subject to prior encumbrances." In October, 1822, pending a suit in this court by K. against J. for the foreclosure of the mortgage, J. and his wife re-conveyed that part of the mortgaged premises which he still held, and which had been levied on as aforesaid, to K., in payment and discharge of the mortgage, and K. took possession of the land; the registry of the mortgage, however, was left uncanceled. Afterwards, the sheriff sold, under the said levy, and H. became the purchaser; H., when he so bought, having knowledge of the foregoing facts. *Held* that H. was not entitled to the land free from the mortgage debt, but that K. must be considered in the light of a mortgagee in possession, and H. as only entitled to redeem on payment of the mortgage debt. *Kinnamen v. Henry*, 90
6. A receiver to collect rents from tenants of the mortgagor will not be appointed on filing a foreclosure bill. *Best v. Schermier*, 154
7. A mortgagor may authorize a second mortgagee to collect rents from tenants of the mortgagor, and apply them as payments on his mortgage; and he will not be restrained from doing so on the filing of a foreclosure bill by the first mortgagee. *Ib.*
8. A mortgage purporting to secure a bond is not good without the bond, unless it be made to appear that the person named as mortgagee, is entitled to the possession of the bond. And a person coming into possession of the mortgage by assignment from him who is named as mortgagee, stands in no better condition. *Garroch v. Sherman*, 219
9. A bond and mortgage showing on its face that it was given to secure the payment of the bond were executed. The mortgage came into the possession of the person named therein as mortgagee, he having no consideration. The bond was never delivered. The person named as mortgagee assigned the mortgage to one who testified that he advanced no money on the faith of it; and he assigned it to the complainant, who, on taking the assignment of the mortgage, gave a writing under his hand and seal that, in consideration of the assignment, he agreed to pay certain notes drawn and endorsed by the person named as mortgagee, and to cancel certain claims then in his hands against the person named as mortgagee. Under the pleadings and proofs, the bill to foreclose the mortgage was dismissed. *Ib.*
10. On bill by a mortgagee against a mortgagor, making other mortgagees, and judgment creditors of the mortgagor parties defendants, a decree for sale was made to satisfy the encumbrances, according to their priorities. The property was sold under the decree. Afterwards, the mortgagee last in priority, the proceeds of the sale under the decree not being sufficient to pay any part of his mortgage, bought the property from the purchaser under the

decree, and filed a bill against the mortgagor, who still remained in possession, to restrain him from committing waste. The injunction was allowed, and a motion to dissolve it was denied. *Phoenix v. Clark*, 447

11. After sale of mortgage premises under decree and execution, the mortgagor in possession will be restrained from committing waste. *Ib.*

12. On bill by a second mortgagee, nothing more than the equity of redemption mortgaged to him can be decreed to be sold, unless the first mortgagee comes in with his mortgage, and thereby consents that a decree shall be made for the sale of the property to pay his mortgage also. *Roll v. Smalley*, 464

13. A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it. *Shaeffer v. Chambers*, 548

14. He is bound to keep it in good ordinary repair, and if it be a farm, he is bound to good ordinary husbandry. *Ib.*

15. A mortgagee of a farm, having taken possession thereof, must show reasonable diligence to procure a tenant, or he will not be relieved from the charge of rent, on the ground that the farm was not cultivated. And if he cannot find a tenant for the building and the farm, he should cause the farm to be tilled. *Ib.*

16. Annual rents allowed against a mortgagee in possession, when the annual rents and profits and wood and timber cut from the premises exceeded the interest and expenses. *Ib.*

17. A bond and mortgage given in fulfillment of a prior written agreement for the sale and purchase of property, at a price stipulated, to be paid in a stipulated manner, with interest, the interest to be paid half yearly in advance, held not to be usurious. *Hoyt v. The Bridgewater Copper Mining Company*, 253

Vide ASSIGNMENT AND ASSIGNEE, 1. DEBTOR AND CREDITOR, 1. SET OFF, 1.

II. Priority of Mortgages.

A *bona fide* assignee of a mortgage first in execution and registry, with notice of an agreement under seal between the first and second mortgagees, that the second mortgage shall be considered and held to be the prior encumbrance, no change being made in the registry of the mortgages, has an equity superior to that of the second mortgagee under such an agreement. *The New York Chemical Manufacturing Company v. Peck*, 37

N.

NE EXEAT.

The affidavit on which the application for a *ne exeat* was made in a divorce case, was made before the petition for divorce was filed. *Ne exeat* denied. The proper course is, to file the bill or petition for divorce, and, after that, to file a petition for the *ne exeat*, supported by the necessary affidavit, sworn subsequently. *Bylandt v. Bylandt*, 23

P.

PARTITION.

1. A father put a son in possession of a house and lot, which the son occupied during the father's life, more than twenty years, and on which, with the knowledge of the father, he made large improvements. If the value of the house and lot, without the improvements, be not equal to a share of the whole real estate to be divided, the house and lot may be set off, in the division, to the son at its value without the improvements. If the value of the house and lot, without the improvements, be greater than a share, the house and lot may be set off to him, and he be directed to pay so much as will equalize the shares. *Gordon v. Barkeley*, 94

2. A father devised to his three sons certain lands, to be held by them as tenants in common during their natural lives, and after the death of either of them, his share to go to his lawful issue; and if any of his said sons should die without leaving lawful issue, his share to go to the survivors of them; or if any of them have died, their lawful issue to have the share that would have gone to their father if living. *Held* that no partition could be made among the sons except of their present interest or estate in the lands. *Reeves v. Reeves*, 156

PARTNERSHIP.

1. Bill for dissolution of a partnership and injunction and receiver, on which a receiver was appointed. *Heathcot v. Ravenacroft*, 113
2. V., a minor, entered into a partnership with N. and S., in Sussex county, and put in \$1000 of capital. Before V. came of age, the partnership was dissolved, V. receiving his \$1000. After the dissolution, V. having removed into Hunterdon county, R. recovered a judgment against the members of the firm, including V., without V.'s knowledge, no process being served on him. R. transferred his judgment to A. Three years afterwards, A. brought an action on the judgment, and recovered a second judgment on it, without the knowledge of V., no process being served on him. A. procured the second judgment to be docketed in the Supreme Court, and caused an execution to be issued to the sheriff of Hunterdon, and to be levied on the property of V. in that county. On bill filed by V., stating the foregoing facts, and charging combination and fraud, to subject him to the payment of the judgment, an injunction restraining proceedings on the execution was allowed. The defendants put in an answer, and a motion was made to dissolve the injunction. The injunction was continued to the hearing. *Van Sickle v. Rorback*, 234
3. The partner on whom, upon a dissolution of the partnership, the settle-

ment of its affairs devolved, is entitled to reasonable compensation for his services. *Hutchinson v. Onderdonk*, 277

Vide USURY, 7.

PATENT RIGHT.

Vide INJUNCTION, 10.

PAYMENT.

Extension of time for making payments. *Gregory v. Stillwell*, 51

Vide DEBTOR AND CREDITOR, 1.

PENSION.

Vide WILL, 8.

PERFORMANCE.

Vide SPECIFIC PERFORMANCE.

PLEA

Vide PLEADINGS.

PLEADINGS.

Bill.

1. S. L. being seized of lands which were encumbered by mortgage and judgments, made a will devising the same. The lands were afterwards sold under the executions issued on the judgments, and bought at the sheriff's sale by I. C. An agreement was afterwards made between I. C. and S. L., that on S. L.'s paying to I. C. the amount of the purchase money and interest thereon, in six months, I. C. would convey the premises to S. L. S. L. filed his bill, stating that he had tendered the money required by the said agreement, and demanded a conveyance, but that I. C. refused it, and prayed a decree for the performance of the agreement. An opinion was pronounced in favor of the complain-

- ant, but before the decree was signed, the complainant died. Leave was given to file a bill of revivor, and it was held that the heirs at law of S. L. were the proper persons to revive or prosecute the suit, and that the executor and the persons interested in the personal estate under the will of S. L., should be made parties. *Laning v. Cole*, 102
2. A tenant under a written lease for a year, after the expiration of the year, filed a bill praying the specific performance of an alleged parol agreement by the landlord for a lease for a second year, and an injunction restraining proceedings at law instituted by the landlord to turn him out of possession. The bill stated that the complainant could make no proof at law, of the parol agreement, and prayed a discovery of it. The answer denied the alleged parol agreement. The injunction was dissolved, and the bill dismissed. *Jones v. Sherwood*, 210
3. If the answer to a bill of discovery and for injunction against proceedings at law denies the matters of which discovery is sought, and there is no other ground of equity jurisdiction in the case, the injunction will be dissolved, and the bill dismissed. *Ib.*
4. Supplemental bill, nature of. *Outwater v. Berry*, 63
- Vide* TRUST AND TRUSTEE, 7.
LAPSE OF TIME, 1.
5. Cross-bill.
- Vide* SPECIFIC PERFORMANCE, 6.
6. Bill of interpleader.
- Vide* INJUNCTION, 7.
7. Bill of revivor.
- Vide* PLEADINGS, BILL, 1.
- Answer.*
1. Matter set up in avoidance must be proved. *Vanderhoof v. Clayton*, 192
2. If the answer to a bill for discovery and for injunction against proceedings at law denies the matters of which discovery is sought, and there is no other ground of equity jurisdiction in the case, the bill will be dismissed. *Jones v. Sherwood*, 210
3. The repetition in a further answer, or in answer to an amended bill, of anything contained in a former answer which is not necessary or expedient, is impertinent. *Garr v. Hill*, 457
4. The language of an answer scrutinized. *The New York Chemical Manufacturing Company v. Peck*, 37
5. It is of the utmost importance that defendants be held to the established rules for answering. It is not sufficient for a defendant to say he has no knowledge of a fact charged in the bill. *Kinnaman v. Henry*, 90
- Plea.*
- Vide* DOWER, 2.
COURT OF ERRORS AND APPEALS—DOWER, 1, 2
- POWER.
1. The court may aid a defective execution of a power, but will not supply the execution where none has been attempted or intended. *Lipincott v. Stokes*, 122
2. Where the circumstances are so equivocal as to leave the mind in doubt whether an execution of a power was at all intended, the court should not interpose. An intention to execute the power should clearly appear. *Ib.*
- PRACTICE.
1. The report of a master on exceptions to answer is brought before the Chancellor, not by exceptions to the master's report, but by appeal. *Wheeler v. Redmond*, 153
2. Process on the original bill should be served before a supplemental bill is filed. *Outwater v. Berry*, 63

3. Circumstances under which the want of subpoena on the original bill was held not to be good ground of general demurrer to the supplemental bill. *Ib.*

4. A general demurrer bad in part will be overruled. *Ib.*

5. Before a party can be examined as a witness, an order must be obtained for that purpose. *Hewitt v. Crane*, 159

Vide ALIMONY, 2.
 NE EXEAT, 1.
 INJUNCTION, 2, 3.
 PLEADINGS—ANSWER, 2.
 COURT OF ERRORS AND AP-
 PEALS—RELIEF.

PREROGATIVE COURT.

Vide PARTITION, 2.
 DOWER, 1, 2.

R.

RECEIVER.

1. Where real estate in another state has been in the use of a corporation of this state a number of years, and the situation of it in reference to legal title has been the same during the time, and the company are in no more danger in reference to the title, than they have been during the time, and no danger is alleged as to the responsibility of the person in whom the legal title is, a receiver to take charge of it will not be appointed on the application of one who has been a stockholder of the corporation during all the time. *Hager v. Stevens and others*, 374

2. A receiver will not be appointed, on a bill filed by one stockholder of a company against a director of the company, to take charge of moneys alleged to have been improperly received and retained by the said director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors. *Ib.*

Vide PARTNERSHIP, 1.
 MORTGAGE, 6, 7.
 CREDITOR'S BILL, 1, 2.
 TRUST AND TRUSTEE, 7, 8, 9.

RELIEF.

Vide COURT OF ERRORS AND AP-
 PEALS—RELIEF.

REVIVOR, (BILL OF.)

Vide PLEADINGS—BILL, 1.

S.

SET-OFF.

B. H., by his will, directed that when his youngest daughter should attain 18, the executors should sell a certain farm, and place the proceeds at interest, to be equally divided among his daughters, and to be paid to them when they respectively attained 18; provided that it should be in the discretion of his executors, or the survivor of them, to place the same in the hands of trustees for the use of his daughters, or either of them, to be paid to them, or the interest paid to them, free from the debts or control of any husband. J. B. A. married a daughter, who died leaving a daughter by him. Afterwards, the executors sold the farm, and J. B. A. received from them \$1000 of the proceeds, and gave his bond and mortgage therefor to the executors. Afterwards, J. B. A. married another daughter, and also obtained letters of guardianship of the estate of his daughter by his first wife. On bill to foreclose the mortgage, the court refused to allow the shares of J. B. A.'s daughter and wife of the proceeds of the farm to be set off against the mortgage *Hendrickson v. Anderson*, 594

SHERIFF'S SALE

Vide MORTGAGE, 5.
 COURT OF ERRORS AND AP-
 PEALS—SHERIFF'S SALE, 1.

SPECIFIC PERFORMANCE.

1. Bill for specific performance and injunction thereupon, and injunction dissolved on answer. *Gregory v. Stillwell*, 51
2. S. L. being seized of lands which were encumbered by mortgage and judgments, made a will devising the same. The lands were afterwards sold under the executions issued on the judgments, and bought at sheriff's sale by I. C. An agreement was afterwards made between I. C. and S. L., that on S. L.'s paying to I. C. the amount of the purchase money, and interest thereon, in six months I. C. would convey the premises to S. L. S. L. filed his bill, stating that he had tendered the money required by the said agreement, and demanded a conveyance, but that I. C. refused it, and prayed a decree for the performance of the agreement. An opinion was pronounced in favor of the complainant, but before the decree was signed, the complainant died. Leave was given to file a bill of revivor. *Lanning v. Cole*, 102
3. The court will not make a decree for the specific performance of what it can merely infer with uncertainty was the agreement in the case. *Rockwell and Lee v. Lawrence and Wikoff*, 190
4. It is within the jurisdiction of the court, on denying specific performance of an agreement to sell lands, in a suit by the person contracting to buy, and who thereupon went into possession, to order compensation to be made by the party contracting to sell, for what the party contracting to buy had done and paid towards fulfilling the contract. *Ib.*
5. A tenant under a written lease for a year, after the expiration of the year, filed a bill praying the specific performance of an alleged parol agreement by the landlord for a lease for a second year, and an injunction restraining proceedings at law instituted by the landlord to turn him out of possession. The bill stated that the complainant could make no proof at law of the parol agreement, and prayed a discovery of it. The answer denied the alleged parol agreement. The injunction was dissolved, and the bill dismissed. *Jones v. Sherwood* 210
6. "The Society for Establishing Useful Manufactures," incorporated in 1791, located at the falls of the Passaic, pulled down a gate and waste way of the canal of "The Morris Canal and Banking Company," incorporated in 1824, and discharged the water from the canal into the Passaic above the falls. The canal company repaired the breach and filed their bill against the society for an injunction, which was granted. The society filed a cross-bill, setting up an agreement entered into between the canal company and them, in 1826, for the discharge of water from the canal into the Passaic above the falls, and stating that the canal company, in breach of the agreement, had nailed down the gates of the waste way and stopped the flow of water from the canal to the river, and thereby broke the agreement, and praying a decree for the specific performance of the agreement. A demurrer to the cross-bill was overruled. *The Society for Establishing Useful Manufactures v. The Morris Canal and Banking Company*, 252
7. In May, 1837, A being about to raise his dam to a height that would cause the overflow of B's land, agreed to buy B's land, and to pay for it on the 1st of April, 1838, the day fixed for the delivery of the deed. On the same day, a further agreement was made between them, that as a compensation for the damages B might sustain until the completion of the agreement to buy, B should occupy and use certain lands of A. In the fall of 1837, A raised his dam, and B took possession of the said lands of A. In October, 1838, B tendered the deed, but A did not pay, and the deed was not delivered. In 1844, B filed his bill, praying that A might be decreed to pay by a day to be fixed, and that on his failing to do so, the said agreement might be canceled, and A be directed to lower his dam. An

order was made that A pay by a day fixed, or that the agreement be canceled. The order prayed as to lowering the dam was denied. *Stevens v. Ryerson* 477

Vide INJUNCTION, 6, 10.

SUPPLEMENTAL BILL.

Vide PLEADINGS—BILL, 4.

SURVIVOR.

Where securities for money are made payable to two persons, the surviving payee or obligee is entitled to the custody of them, and to collect the money on them, and the representatives of the deceased co-payee or co-obligee are not at liberty to take half of them in amount from his possession. *Lippincott v. Stokes*, 122

T.

TIMBER.

Vide WASTE, 1, 2, 3.
SET-OFF, 1.

TRUST AND TRUSTEE.

1. Sale of real estate by a trustee set aside. *Outwater v. Berry*, 63
2. F. S. devised and bequeathed to his wife, D., the use of all his estate during her life, and directed that, after her death, the estate should be sold, and the proceeds divided among certain persons named in the will. The widow, D., was sole acting executrix of the will. She afterwards married J. E., who received from her at different times moneys belonging to the estate of F. S., deceased, and gave receipts therefor as moneys of the said estate. *Held* that D.'s being entitled to the use of the moneys during her life, did not destroy the trust character in which she, as executrix, held the money, and that J. E. was bound

by the same trust. *Administrators of Shible v. Administrators of Ely*, 181

3. Trusts are enforced against one who comes into possession of the property bound by the trust, with notice of the trust. 16.

4. In 1696, the proprietors of the province of East New Jersey, conveyed to four persons of the town of Newark, "all that tract of land allotted for the burying place," (describing it,) to have, &c., unto the said grantees, their heirs and assigns forever, to the only use of the old settlers of said town, their heirs and assigns forever, to be and remain to and for the use therein specified, and to be appropriated to no other use or uses whatever." The trustees took possession of the tract, and held it in trust for a burying place; and it was so used from the date of said conveyance until 1829. In 1798, the inhabitants of Newark were incorporated. In 1804, the legislature passed an act vesting the said trust estate in the corporation, and declaring that the estate thereby vested should be appropriated, and forever remain to and for the uses in the said original grant expressed, and for no other use or uses whatever. In 1836, "The Mayor and Common Council of the City of Newark," by the act incorporating the freemen of Newark under that name, became, by the provision of said act, seized of all the lands, property, &c., of the former corporation, according to such estate and interest therein as the said former corporation had. In 1844, "The Mayor and Common Council" leased a part of the said tract, so allotted for a burying place to J. H. S. In 1844, an information and bill was filed, praying that the said lease may be set aside; and that "The Mayor and Common Council" may be decreed to hold the said tract subject to the trusts aforesaid. The defendants pleaded, that by the fundamental constitution for the said province, established in 1683, it was declared that 14 years' quiet possession should give an unquestionable right to any lands, except in the case of infants, &c.; that the

- first settlers of Newark had quiet possession of the said tract 14 years, from 1667 to 1695; that said tract was, in 1667, and from that time until 1713, in the quiet possession of the said first settlers, until they were, in 1713, by letters patent from Queen Anne, incorporated by the name of "The Trustees of the Freeholders and Inhabitants of the Township of Newark;" and that the said "The Trustees of the Freeholders, &c.," were and continued in quiet possession until 1798, when the act was passed incorporating "The Inhabitants of the Township of Newark;" and that the said last mentioned corporation were in actual possession until 1836, when the act was passed incorporating "The Mayor and Common Council of the City of Newark;" and that the said last mentioned corporation were then, and ever since have been in the possession of the said tract. The plea was overruled, and the defendants were ordered to answer. *The Attorney-General, ex. rel. Ryerson, v. "The Mayor, &c., of Newark," and J. H. S.* 201
5. The question of property and right of possession, between two bodies, each claiming to be the trustees of an incorporated religious society, is a question to be determined at law. *Miller and others, Trustees, v. English,* 304
6. A dissension having arisen in an incorporated religious society, growing out of the question whether a house of worship should be built, at another place, a part of the congregation built the new house, and elected a board of trustees. A part of the congregation remained in the old building, and the persons claiming to be the trustees of the old society refused to the new party entrance into the old burying ground for the purpose of burial, and the new party on several occasions, broke open the gates of the old burying ground, for the purpose of burying therein. On bill filed, an injunction was granted restraining such forcible entry. On answer and argument, the court held that a forcible entry for such purpose, was not such an injury as called for the interposition of the court by injunction. *Ib.*
7. One stockholder of an incorporated company filed a bill against three other stockholders of the same company, praying an account of all the property bought by them, or either of them, with the money of the company, and of the rents and profits thereof, and all moneys received from the business of the company and expended in the purchase of property; and that they may account for all breaches of trust as directors, agents, or trustees of the company, and make good all losses incurred thereby; and may account for all moneys made by them or either of them, by the purchase or sale of any property of the company; and may be decreed to pay the complainant his proportionate share of what may be found due, and of all surplus moneys in the hands of them or either of them, not required for the business of the company, or to pay the same to a receiver; and that all the property not necessary for the objects of the company may be sold, and the proceeds divided among the stockholders, or paid to a receiver. And that a receiver be appointed of the rents and profits of the real estate at Camden, purchased with the funds of the company, and of all other property purchased by them or either of them with the funds of the company, without the consent of the company, and not necessary for the objects of the company. And that they may be restrained by injunction from selling any real estate purchased with the funds of the company, and from selling any other property of the company without the consent of the stockholders, and from managing and controlling the affairs of the company at their will and pleasure, and without the consent of a lawfully constituted board of directors. An injunction was allowed pursuant to the prayer of the bill. A supplemental bill was filed, stating other facts, and making other persons defendants, and praying the same relief against them; and praying that they and the defendants in the original bill may be restrained by injunction from disposing of any of the property of the company, and from winding up the concerns of the company, or causing the

company to go into liquidation, without the consent of the stockholders. An injunction was also allowed on this bill pursuant to the prayer thereof. *Hager v. Stevens*, 374

8. A motion was afterwards made for the appointment of a receiver, to take charge of certain real estate in Pennsylvania, alleged by the bill to have been purchased with the funds of the company, the legal title to which was in another person, and of certain moneys alleged in the bill to be the funds of the company, in the hands of one of the defendants, the use of which the bill alleges he has improperly obtained, and as to which the answer says it was loaned to him by the board of directors. The motion was denied. *Ib.*

9. The Chancellor intimated that if a large accumulation of property by a corporation should appear to be the result of a fraud on the rights of others not parties to the suit, the court would not become the instrument to distribute the moneys accumulated by such fraud, on the application of one who had been a stockholder of the company from the beginning, and cognizant of the fraudulent proceedings which resulted in such accumulation. *Ib.*

Vide WILL, 4, 5, 6.
INJUNCTION, 7.

U.

USE.

Vide TRUST AND TRUSTEE.

USURY.

1. A bond and mortgage declared usurious under the pleadings and proofs. *Cummins v. Wire*, 73
2. The payment and receipt of usurious interest is *prima facie* evidence of a prior usurious contract. *Ib.*
3. It was agreed that C. should lend W. \$2000 on interest, and that W. for the loan should give C., before

receiving all the money, a wagon, of the value of \$100, over and above the legal interest; and that to secure the payment of the \$2000, with legal interest, W. should give C. a bond and mortgage. *Held* usurious. *Ib.*

4. A purchaser at sheriff's sale on judgment and execution at law, subject to all prior legal encumbrances, can take advantage of usury in a mortgage of prior date to the judgment. *Semble*. That a subsequent judgment creditor can take advantage of usury in a prior mortgage. *Ib.*

5. A bond and mortgage given in fulfillment of a prior written agreement for the sale and purchase of property, at a price stipulated, to be paid in a stipulated manner with interest, the interest to be paid half yearly in advance. *Held* not to be usurious. *Hoyt v. The Bridgewater Copper Mining Company*, 253

Vide COURT OF ERRORS AND APPEALS—USURY, 1.

6. A new bond and mortgage were substituted for the first, dispensing with the payment of interest in advance. The Chancellor said that if he could think the first usurious, he should hold that such a contract might, by a subsequent agreement of the parties, be freed from the vice. *Ib.*

7. R. had, during the continuance of a partnership between H. and O., loaned money from time to time to the firm, for which he charged and received the interest; and had also from time to time endorsed notes for the firm, which were paid by the firm. On the dissolution of the partnership, the settlement of its affairs devolved on O., and in an account subsequently presented by him to H., he claimed an allowance of \$500 for R. for endorsing for the firm, and claimed that he and H. had agreed to make the said allowance to R. There being no satisfactory proof that the \$500 had actually been paid by O. to R., the court refused to allow it. *Hutchinson v. Onderdonk*, 277

Vide COURT OF ERRORS AND APPEALS—AGREEMENT 3.

W.

WASTE.

1. A husband had, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They commenced cutting during the life of the wife, and her death happening soon after, continued cutting after her death. On bill filed by her infant heir-at-law, the cutting was restrained by injunction. At the time of the service of the injunction, some trees were still standing on some of the lots, the timber on which had been sold. It was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question whether the husband should account for it; and also to inquire and report whether the interest of the infant required that the trees still standing on the said lots should be felled.
Ware v. Ware, 117

2. Ordinarily, account for waste done is only incidental to relief by injunction against further waste. *Ib.*
3. If timber on land of an infant reversioner is in danger of decay, the court may direct it to be cut. *Ib.*

Vide MORTGAGE, 10, 11.

WATER RIGHTS.

Vide SPECIFIC PERFORMANCE, 7.

WILL.

1. A owning land, makes a will devising it. The land is afterwards sold on execution. An agreement is then made between the purchaser at the sale on execution and A that the purchaser, on A's paying him what he gave for the property and interest on it, in six months, would convey the property to A. A afterwards died. *Held* that the interest acquired by A in the land under the

said agreement did not pass by the will. *Lanning v. Cole*, 102

2. A will as to land speaks only as of the time of making it; as to personality, it speaks as in *articulo mortis*. *Ib.*
3. E. E. bequeathed to "The Bridgeton Trustees for Free Schools" \$1000, the interest to be applied annually for ages, as far as may be practicable, for the tuition of poor children, without regard to denomination or color, in the elements of English literature. There was no such body as "The Bridgeton Trustees for Free Schools," but there were in the town of Bridgeton trustees of public schools, (usually called free schools,) as established by the statute respecting public schools. The bequest was held good as a trust to be executed; trustees were appointed by the Court. *McBride v. The Executors of Elmer*, 107
4. H. C. bequeathed to W. L., since deceased, and A. S. R. and to the survivor of them, one-fourth part of her personal estate, in trust to place the same at interest, and to pay the interest arising thereon, yearly, to H. H. so long as she shall live; and also, in trust to pay H. H. so much of the principal as she shall, from time to time, by writing under her hand attested by two credible witnesses, require of the said trustees; and if she shall leave children living at her death, or descendants of such children, then that what shall remain undisposed of of the said one-fourth part, with its accumulated interest, shall belong to and vest in her children, to be paid to them at 21 years of age, respectively; with further provisions in case she shall die without leaving children or descendants of children. H. H. died without leaving any child or any descendant of any child, and leaving a will, by which, after giving a number of pecuniary legacies, she gives the residue of her estate, real and personal, to, &c. One question decided in the cause was whether H. H. had withdrawn from the trust any of the fourth part bequeathed to her, in the mode directed by the

- will, or by any act which could be considered equivalent to it. *Lippincott v. Stokes*, 122
5. The executors of the will of H. H. having obtained possession of securities belonging to the trust fund were ordered to restore them to the trustee. *Ib.*
 6. The words "accumulated interest" in the said will were held to apply only to the interest remaining unpaid to H. H. at her death. *Ib.*
 7. The will first gave to A. P. W. the sum of \$10,000, and then gave a number of pecuniary legacies, and certain specific legacies; then followed this clause: "My bank stock I wish to make a part of A. P. W.'s legacy, as they will give her less trouble in collecting." The will then gave certain other specific legacies; and gave all the remainder of his property to four cousins. Then followed this clause: "I wish that the house I have lately purchased of C. M. C., valued at \$4000, be a part of my dear aunt's (A. P. W.'s) legacy; and that, in the division of her portion, my Trenton Bank (stock) be calculated at \$40 per share, and the Easton Bank (stock) at \$30 per share." The personal estate was insufficient to pay the pecuniary legacies in full. *Held*, that A. P. W. took the house and lot and the bank stock, at the valuations thereof, respectively, given by the will, without being subject to abatement. *White v. Executors of Olden*, 174
 8. C. H. received a certificate for a pension for five years, commencing from March 4th, 1836, at the rate of \$310 a year. E. C. C. acted for her in procuring the pension; but, for reasons stated, the power of attorney to draw the pension, was given to J. C.; and J. C., about the 6th of March, 1839, received, for the pension money then due, \$931.93. C. H. had lived a number of years with J. C., in his family. On the 8th of March, 1839, C. H. signed a receipt by which she acknowledged to have received from E. C. C. \$931.93, in full of her pension up to March 4th, 1839, obtained by him for her, except \$430 which she had agreed to give him for his services in obtaining the pension for her and paying the expenses. C. H. died February 18th, 1841, having continued to live with J. C. until her death, leaving a will, dated February 10th, 1841, by which she gave to her daughter, C. V., "all her property and possession, whether real or personal, and also the amount of her pension which might be due at her death," and appointed E. C. C. executor of her will. *Held*, first, under the circumstances, that the \$931.93, received in March, 1839, could not be considered as belonging to C. H. at the date of the will. Second, that E. C. C. was entitled to retain the \$430; and that it was not a case within the act of congress, in reference to agreements before pensions are obtained. *Vanderhoof v. Clayton*, 192
 9. A devise and bequest were made to "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America." Such a society for the spread of the gospel was organized and known by the above stated name at the date of the will, had its place of business in the city of New York, and its officers and board of directors; and it was incorporated under the above stated name, before the death of the testator. *Held good. Executors of Voorhees v. Executors of Voorhees*, 511
 10. M. A. devised and bequeathed all the rest and residue of her estate, real, personal or mixed, to E. R. A. to be by her possessed, enjoyed and occupied, to her and her heirs forever; but if she should die without heirs and intestate, then that all the estate above devised to her shall vest in her brother Charles M. Armstrong and sister Margaret Salter and their heirs, to be equally divided between them, share and share alike. *Held* that E. R. A. took an estate in fee simple in the lands, and absolute property in the personal estate; that the words "without heirs and intestate" imply a power of disposition, and are inconsistent with and avoid the limitation over.

By the Supreme Court. <i>Armstrong</i>	WITNESS.
<i>v. Kent</i> , 559	Before a party can be examined as a
<i>Vide</i> COURT OF ERRORS AND AP- witness, an order must be obtained	for that purpose. <i>Hewitt v. Crane</i> ,
PEALS—WILL, 1.	159
SET-OFF, 1.	<i>Vide</i> EVIDENCE, 1, 2
TRUST AND TRUSTEE, 2, 3.	



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